United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/999
23 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 999

Case No. 1070: COURY ET AL

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Brigitte Stern; Mr. Omer Yousif Bireedo;

Whereas, on 1 March 1999, Jacqueline Coury, Adel El Daly, Peter Neyner, Ferdinand Nostitz-Rieneck, Christa Poiger, Gerhard Roessner, Gerda Schauer and Elfriede Schwang, former staff members of the United Nations Office at Vienna (hereinafter referred to as UNOV), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 July 1999, the Applicants, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"*II. Pleas*

...

(2) Relief Sought

(i) The Applicants request the Tribunal to find that if one or more of their rights or entitlements were unreasonably denied, and if those responsible for these failed to undertake in good faith, an impartial, disinterested attempt to apply the United Nations

Staff [Regulations and Rules], and other applicable policies, that their behaviour [was] not consistent with the Code of Conduct;

(ii) If measures taken by the Respondent were found to be inconsistent with the Code of Conduct, the Tribunal is respectfully requested to make a recommendation to the Secretary-General that the Joint Disciplinary Committee become seized of the issue;

(iii) The Applicants are distressed that given the scale of the measures and steps taken against them the only form of accountability seems to be institutional accountability, that is, that the Respondent, as a corporate entity, alone may be found to have caused the massive distress that resulted from these measures. The Applicants, accordingly, request the Tribunal to seek to find some way by which accountability might also extend to those individuals responsible for the defamation of the good name of the United Nations caused by their actions.

(iv) The Applicants maintain that the Tribunal has determined the invalidity of efforts to coerce staff into the 'voluntary' signing away of their rights and entitlements on sufficiently numerous occasions in the past (...) to provide clear guidance to a reasonably prudent Respondent and, therefore begs that the Respondent be enjoined from designing, producing and inflicting any such policies and practices in the future;

...

(viii) The Applicants request that the Respondent be compelled, in addition, to make payments of three times the outstanding amounts of end-of-service allowance to the Applicants, using UNAT-approved methodology for its calculations, as decided in Inguilizian;

...

(x) That the provision concerning no re-employment with the United Nations for four years following separation be thrown out."

Additionally, the Applicants Coury, Nostitz-Rieneck, Poiger and Schwang requested the Tribunal to find that:

"(v) The Respondent, because of the deliberate, systematic abuse and deprivation of rights and entitlements that the Applicants have had to endure, be ordered to reinstate the Applicants at their grade and step on the dates of separation to be able to serve the Organization for the duration of their permanent appointments, that is, until the normal time of retirement to which they were entitled. The Applicants would also receive full salary, and all benefits and entitlements due from the dates of separation until the dates of reinstatement.

(vi) In the event the [Secretary-General] decides against reinstatement, the Applicants would still receive full salary and all benefits and entitlements from the last days of active service to the dates of normal retirement at age 60.

(vii) In either case, the Applicants request, in addition, two years full salary. Should the Applicants be paid only the amount due them, it would, they contend, constitute a positive incentive for the Respondent to persist with this patently wrongful behaviour.

...

(ix) The Applicants request that the Respondent be compelled, in addition, to make payments to the Applicant Schwang of three times the outstanding service credits calculated to the end of the period of SLWFP [special leave with full pay], including, but not limited to, amounts of end-of-service allowance, using UNAT-approved methodology for its calculations, as decided in Inguilizian, days of vacation or annual leave, and salary increments, if any;

...

(xi) That the Respondent, because of the egregious, deliberate and systematic nature of his acts, be compelled to circulate in the form of an SGB [Secretary-General Bulletin] a description of the policies and practices stemming from this and related cases which were in violation of staff rights and entitlements and an apology therefore."

Additionally, the Applicants El Daly, Neyner, Roessner and Schauer requested the Tribunal to find that:

"(v) The Applicants request that the Respondent be compelled, in addition, to make payments of three times the outstanding amounts of end-of-service allowance to the Applicants, using UNAT-approved methodology for its calculations, as decided in Inguilizian;

...

(vii) Because of the deliberate, systematic, deprivation and defrauding of entitlements that the Applicants have had to endure, the Applicants request, in addition, two years full salary and all benefits and entitlements. Should the Applicants be paid only the amount due them, it would, they contend, constitute a positive financial incentive for the Respondent to persist with this patently wrongful behaviour;"

In addition, the Applicants also requested the Tribunal to find that:

"(i) These cases which have been decided by the Vienna JAB to be non-receivable, are receivable;

(ii) Whether or not the Tribunal agrees with these cases having been joined by the JAB, the Tribunal may consider this application along with the eight individual applications prepared for the JAB in reaching a decision as to receivability;

(iii) For the reasons outlined in the cover letter and below, it may give *expedited* consideration to these applications;

(iv) The Respondent, when silent on the issue of receivability during the administrative review, may not then find an appeal to be not receivable after the appeals are filed. The preliminary responses from the Respondent (...) stated: '... the Secretary-General always reserves the right to raise the issues of receivability and competence, as appropriate.' As these rights, however, were not exercised in the course of the administrative review, the Applicants maintain that they may not be raised later as is the case with appeals by staff.

(v) Since no 'Respondent's Reply' had been received in a timely manner, no 'Respondent's Reply' may be considered by the JAB. Rather, the JAB would be called upon, because of the extensive delays already encountered, and because it enjoys no authority under its present Draft Rules of Procedure and Guidelines to reconsider cases *de novo* or to request comments anew, to proceed immediately to a consideration of the cases before it with those materials in its possession as of the time it took its decision;

(vi) The Applicants, because of the preliminary decisions and because of the presence of most of the cast of characters who took the original decisions being appealed are still in Vienna, may submit the cases to the JAB in New York, or should they so wish, submit the substantive questions to a new JAB panel in Vienna.

(vii) That the JAB foreclosed access to [staff rule] 111.2 (f) as well as the Rules of Procedure and Guidelines of the Joint Appeals Board at Headquarters, III, G, (1) and thereby breached these. For these reasons the Tribunal is respectfully requested to find that the JAB was derelict in its duty."

Whereas the Respondent filed his Answer on 18 January 2001;

Whereas the Applicants filed Written Observations on 22 April 2001 and a further communication on 3 June 2001;

Whereas the facts in the case are as follows:

The Applicant Coury joined the United Nations on 27 October 1969 as a Shorthand Typist at the G-5, step II level. At the time of her separation from service, on 31 August 1996, she was serving as an Editorial Assistant at the G-6, step XI level, in the Research Section of the United Nations Drug Control Programme (UNDCP).

The Applicant El Daly joined the United Nations on 1 March 1968, as a Registry Clerk, at the G-3, step II level. At the time of his separation from service, on 31 December 1996, he served as a Statistical Assistant at the G-6, step XI level, in the Estimates Unit, UNDCP.

The Applicant Neyner joined the United Nations on 16 August 1967 as a Messenger at the M-3, step I level. At the time of this separation on 31 March 1996, he was serving as Senior Documents Control Clerk at the G-5, step XII level, in the Documents Control Unit, UNOV.

The Applicant Nostitz-Rieneck joined the United Nations on 1 August 1968 as a Security Guard at the M-3, step I level. At the time of his separation from service, on 7 June 1996, he was serving as a Telephone Operator at the G-3, step XII level, at UNOV.

The Applicant Poiger joined the United Nations on 31 July 1967 as a Telephone Operator at the M-4, step I level. At the time she separated from service, she served as a Documents Clerk at the G-3, step XII level, in the Interpretation and Meetings Section, UNOV.

The Applicant Roessner joined the United Nations on 19 June 1978 as a Composition Clerk, at the G-5, step IV level. At the time of his separation from service, he was on special leave with full pay from his position as a Composition and Layout Clerk at G-5, step X level, in the Translation and Editorial Service, UNOV.

The Applicant Schauer joined the United Nations on 1 December 1969 as a Library Clerk at the G-4, step IV level. At the time of her separation from service, on 2 August 1997,

she was on special leave with full pay, from her position as a Reference Assistant at G-6 Level XI in the Reference and Terminology Unit, UNOV.

The Applicant Schwang joined the United Nations on 18 August 1969 as an information Clerk at the G-5, step I level. At the time of her separation from service, on 31 March 1997, she was on special leave with full pay from her position as a Public Information Assistant at the G-6, step XI level, in the United Nations Information Service, UNOV.

Each of the Applicants served in Vienna at the time of separation from service, and held permanent appointments, which were terminated under an Early Separation Programme (ESP).

On 18 May 1995, the Under-Secretary-General for Administration and Management circulated an administrative instruction, ST/AI/403, on the subject of the ESP outlining eligibility requirements, compensation package, and other aspects of the programme. On 29 March 1996, he circulated a second administrative instruction, ST/AI/414, which offered a modified ESP, allowing for the possibility of continued contribution to the United Nations Joint Staff Pension Fund. On 3 May 1996, an Addendum to ST/AI/414 was issued providing a similar option for insurance purposes.

The Applicants chose to apply for the ESP and, prior to their separation from service, signed a Memorandum of Understanding (MOU) which set forth the terms and conditions of termination. Each MOU contained the following clause: "... should the Secretary-General decide to terminate my appointment under the provision of Staff Regulation 9.1(a), I will not contest such decision or any decision relating to this termination action". The MOU signed by the Applicant Coury also contained the proviso "provided that staff rules and regulations will be applied correctly".

Additionally, each MOU contained a clause precluding the Applicants from employment with the United Nations, its subsidiary organs and programmes, for a period of four years following separation.

On 28 September 1995, 14 March 1996, and 8 May 1996, respectively, the Applicants El Daly, Neyner and Schauer were notified of the termination of their employment. The other

Applicants were formally so notified on 31 May 1996. The Applicants El Daly and Neyner were separated from the Organization under the ESP pursuant to ST/AI/403; the other Applicants, pursuant to ST/AI/414 and Add.1.

On 19 December 1997, the Applicant Coury requested administrative review of the decision to terminate her appointment under the ESP and claimed, *inter alia*, that she had been "deprived and defrauded of the end-of-service allowance". Similar requests for review were made by the Applicant Nostitz-Rieneck on 19 December 1997; the Applicant Schwang on 20 December 1997; the Applicants El Daly, Neyner, Roessner and Schauer on 20 January 1998; and the Applicant Poiger on 23 March 1998.

The Applicants Schwang, Coury and Nostitz-Rieneck lodged their appeals with the UNOV Joint Appeals Board (JAB) on 19, 20 and 23 March 1998, respectively. The Applicants Neyner and El Daly lodged their appeals with the JAB on 28 and 29 April 1998, respectively; the Applicants Roessner and Schauer on 8 and 11 May 1998, respectively; and, the Applicant Poiger on 5 June 1998.

The JAB adopted its report on 17 December 1998. The proceedings, conclusion and recommendations read, in part, as follows:

> "**E. Proceedings ...**
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> ...
>
> 31. ... [I]t decided to join the appeals of [the eight] Appellants ... on the basis that those appeals involve[d] common issues of fact and law. ...
>
> 35. ... [T]he Panel met to reconsider the receivability of the Appellants' appeals ... It ... noted that under staff rule 112.f, if an appeal is filed outside the prescribed deadlines, which, on the face of it, would thus not be receivable as is the case with present appeals, it is obligated to examine whether ... there existed exceptional circumstances that prevented the Appellants from filing their appeals within the prescribed deadlines.
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> **F. Conclusion and Recommendations**
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> 37. ... [T]he Panel concluded that there are no exceptional circumstances that justify granting a waiver of the time-limit in the present appeals, it thus unanimously decided that the appeals are not receivable.

38. As the appeals are found not receivable, the Panel has no recommendation to make to the Secretary-General concerning these appeals."

On 8 June 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicants and informed them as follows:

"...

The Secretary-General ... has taken note of the Panel's conclusion that there are no exceptional circumstances that justify granting a waiver of the time-limit in your appeal and of its unanimous decision that your appeal is not receivable. The Secretary-General has therefore decided to take no action on your appeal.

..."

On 19 July 1999, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants' principal contentions are:

1. The Respondent denied the Applicants their full entitlements.

2. The Applicants' rights of due process were violated.

3. The Staff Regulations and Rules were improperly applied.

4. The appeals were not time-barred, due to the existence of "exceptional circumstances" which the JAB ignored.

Whereas the Respondent's principal contentions are:

1. The appeals were time-barred.

2. The Applicants voluntarily accepted the terms of their separation offers and undertook not to contest them. They failed to adduce any evidence that they were obliged or in any other way coerced into accepting those offers. All Applicants' pleas concerning specific terms of their separation entitlements are not receivable.

The Tribunal, having deliberated from 4 to 23 July 2001, now pronounces the following judgement:

I. This is an Application filed jointly by eight former staff members of the United Nations who separated from the service of UNOV under an agreed Early Separation Programme (ESP) in 1995 and 1996.

II. In accordance with the terms of the ESP, the Applicants each signed a MOU which stipulated the terms and conditions of the programme, namely that they could not contest their termination or any decision relating thereto, and that they would be barred from employment with the Organization for four years.

III. In each case, over one year after notification that their employment with UNOV was being terminated, the Applicants requested administrative review of this decision. They subsequently appealed to the JAB claiming that their appeals were not time-barred due to exceptional circumstances, and that their agreed termination was unfair as they had not been fully informed that, in participating in the ESP, they would forfeit their end-of-service allowance. In particular, the MOUs contained no specific statement that this Allowance would be relinquished.

The JAB considered the Applicants' case on 9 November 1998 and concluded that their appeal was not receivable as there were no exceptional circumstances which justified waiver of the time limits.

IV. The Applicants now request that the Tribunal find their application receivable, and undo the terms of their respective MOU, ordering their reinstatement and compensation.

The Applicants contend that a number of exceptional circumstances prevented them from filing an appeal within the subscribed time limits. Primarily, they allege that although each signed a MOU in which they agreed not to contest their termination, the Administration had concealed important information from them. They contend that, had they been properly informed of this information, they would have filed their appeals in a timely manner. The

Applicants rely on Judgement No. 508, *Rosetti* (1991) para XV, wherein the Tribunal held that "acceptance [of a new position with local rather than international status] could not have the effect of depriving the Applicant of the allowances and benefits to which she was entitled under the Staff Rules". In the Applicants' view, this confirms that even if a staff member accepts a condition purporting to deprive them of their rights and entitlements, those rights and entitlements are not so relinquished.

V. It is obvious to the Tribunal that each of the Applicants exceeded the established time limits for requesting review of the impugned decision. The Tribunal finds that the Applicants' undertaking not to contest their agreed termination was unrelated to the possible existence of exceptional circumstances that might justify waiving the time limit for filing an appeal as provided in staff rule 111.2 (f). The very purpose of the Applicants' undertaking was to record their commitment not to appeal the decision, within the established time limits or thereafter.

The Tribunal notes that *Rosetti* can be distinguished from the instant case because the Applicants made a specific commitment not to contest their termination.

Further, the jurisprudence of the Tribunal in similar cases makes it clear that a staff member may not accept an agreed separation package and also file an appeal. (See Judgements No. 547, *McFadden* (1992); No. 573, *Bhatia* (1992); and No. 955, *Al-Jassani* (2000).) In *McFadden*, para. VIII, the Tribunal held that

> "the Applicant could not at the same time, accept benefits under staff regulations 9.1 and 9.3 and institute or maintain an appeal as he has sought to do. If he wished to pursue the latter course he should have refrained from accepting the termination package. He was not at liberty to do both".

In light of the above, the Tribunal agrees with the JAB's conclusion that the appeal was time-barred.

VI. Notwithstanding the finding of the Tribunal that the appeal was time-barred, it notes that while the MOUs signed by the Applicants made no reference to the end-of-service allowance, correspondence between the Applicants and the Organization specifically stated that they would not be entitled to the allowance.

VII. In light of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Brigitte STERN
Member

Omer Yousif BIREEDO
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1000
23 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1000

Case No. 1100: LANGER

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Omer Yousif Bireedo;

Whereas, on 17 September 1999, Gerd Detlef Langer, a former staff member of the United Nations, filed an Application requesting the Tribunal to:

"1. Re-examine the Joint Appeal Board's conclusions and recommendations ... in the light of its own jurisprudence and the arguments offered herein;

2. Overrule the decision of the Secretary-General dated 18 June 1999 not to take further action on [his] appeal;

3. Find that [the Applicant] had a legally founded expectancy of continued service with the International Trade Centre ... until [he] reached normal retirement age;

4. Find that this expectancy created a reciproc al obligation on the part of the Respondent which was not fulfilled;

5. Order payment to [the Applicant] of full salary and allowances through 31 March 1999; or alternatively

6. Order payment to [the Applicant] of 12 months of pensionable remuneration based on nearly 18 years of service according to the schedule contained in Annex III of the Staff rules;

7. Order payment to [the Applicant] of a just and reasonable compensation for the loss of expected pension benefits."

Whereas the Respondent filed his Answer on 12 October 2000;

Whereas the Applicant filed Written Observations on 28 December 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of the International Trade Center (ITC), an organ of both the United Nations Conference on Trade and Development and the World Trade Organization, on 1 July 1979, as a Senior Trade Promotion Adviser at the L-5 level on a one-year Project Personnel Appointment (PPA) under the 200 Series of the Staff Regulations and Rules. The Applicant was employed on a series of PPAs until his separation from service on 30 April 1997, at the expiration of his final appointment.

On 11 April 1997, the Chief, Personnel Section, Division of Administration, ITC, wrote to the Applicant advising him of the procedural formalities relating to his separation from service. This was not the first such letter the Applicant had received during his employment with ITC: on 1 August 1994, he received similar information relating to his expected separation from service on 15 August 1994, but the letter was subsequently revoked. In 1997, however, there was no such revocation and, on 16 May 1997, the Chief, Personnel Section, Division of Administration, ITC, signed a "Final Clearance Certificate for Project Personnel" for the Applicant. The Certificate indicated that the Applicant's separation was due to "Expiration of Appointment" and that he was not entitled to a termination indemnity. Similarly, no termination indemnity was reflected in the Applicant's "Final Pay Statement" of 27 May 1997.

On 5 July 1997, the Applicant wrote to the Secretary-General asking for a review of the decision "not to grant [him] a termination indemnity on the basis of staff rule 109.4, following the termination of [his] contract with ITC as a Senior Advisor after nearly 18 years of service".

On 17 October 1997, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB), contesting the management decisions as to termination notice, termination indemnity and the non-renewal of his appointment.

The JAB adopted its report on 19 May 1999. Its considerations, conclusions and recommendations read as follows:

"**Considerations**:

...

54. ... [T]he Panel examined the Appellant's claim that he should be "assimilated" to a 100 Series staff member – in view of his years of service and the functions he encumbered – and that the 100 Series Staff Rules should apply to him by analogy. The Panel noted that '[UNAT], in accordance with the consistent case law on this matter, does not subscribe to such assimilation, which would contradict the terms of contracts freely accepted by the [Appellant]'. [See Judgement No. 647, *Pereyra* (1994).]

55. Furthermore, the Panel did not agree with the Appellant's assertion that because of his functions at ITC (...), his contractual situation was different to that of field staff recruited for implementing a specific project within a programme. ...

56. The Panel was thus of the opinion that the Appellant's appointment was governed by the 200 Series. ...

...

60. With respect to 'assurances' given to him, the Appellant relies on conversations with [senior ITC management] ... The Panel ... considered that they did not constitute a promise of continued employment ...

...

63. ... [T]he Panel did not share the Appellant's view that by withdrawing the 1 August 1994 'separation letter', ITC 'recognized [his] right to a continued employment'. ...

64. The Panel recalled that a series of successive fixed-term appointments ... is not enough to substantiate a claim of a legal expectancy of renewal. ...

...

Conclusions and Recommendations:

66. ... [T]he Panel **concludes** that:

a. The Appellant was entitled neither to a termination indemnity nor to a termination notice; and

b. The Appellant did not have a legal expectancy of renewal of his appointment with ITC.

67. The Panel therefore **recommends** to the Secretary-General that the present appeal **be rejected**."

On 18 June 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General ... has taken note that the Panel found that your appointment was governed by the 200 Series, and that, pursuant to these provisions, your appointment expired and was not terminated. He has also taken note that the Panel found that there was no moral obligation to renew your contract. He has further noted the Panel's conclusions that you were entitled neither to a termination indemnity nor to a termination notice and that you did not have a legal expectancy of renewal of your appointment with International Trade Centre. He has finally noted the Panel's recommendation that your appeal be rejected. Accordingly, the Secretary-General has decided to take no further action on your appeal

..."

On 17 September 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in concluding that the Applicant was not entitled to a termination notice or termination indemnity.

2. The JAB erred in concluding that the Applicant had no legal expectancy of renewal of his appointment, as the conduct of the Respondent created such expectancy.

3. The circumstances of the Applicant's employment are such that the Respondent ought not to be able to end his service without notice or compensation.

Whereas the Respondent's principal contentions are:

1. A temporary appointment under the 200 Series does not carry any expectancy of renewal.

2. The totality of circumstances at the time of the expiration of the Applicant's appointment did not create any expectancy of renewal.

3. The expiration of a temporary appointment for a fixed term on the date specified in the letter of appointment does not give rise to either a termination notice or a termination indemnity.

The Tribunal, having deliberated from 5 to 23 July 2001, now pronounces the following judgement:

I. The Applicant requests the Tribunal to re-examine the decision that he was entitled neither to "a termination indemnity nor to a termination notice" and that he did not have a legal expectancy of renewal of his appointment with ITC.

II. The Applicant maintains that the conduct of the Respondent, ever since his recruitment, was such that he could "reasonably and legally expect that [his] employment would be continued". Furthermore, he contends that "an organization ... cannot suddenly and after many years – in [his] case nearly 18 years - of service rely on the clause that a contract under the 200 Series comes to a definite end without further notice and without compensation". Consequently, he argues that he had a legal expectancy that his contract would be renewed and that the non-renewal was, in effect, a termination, thus entitling him to a termination indemnity. He relies on the jurisprudence of the Tribunal in Judgements No. 298, *Délano de Stuven* (1982) and No. 319, *Jekhine* (1982) to support this contention.

TheTribunal concurs with the conclusions of the JAB. All of the Applicant's appointments were subject to expiration without prior notice as specified in his letters of appointment and none of his appointments was terminated prior to its expiration date. As the Applicant's appointment was not terminated, he was not entitled to a termination indemnity.

III. The Tribunal notes that, before the JAB, the Applicant maintained that although his appointment was governed by the 200 Series, his contractual situation and conditions of appointment differed from that of field staff recruited for implementing a specific project within a programme, and that therefore he should be assimilated under the 100 Series. In Judgement No. 885, *Handelsman* (1998), paragraph II, the Tribunal referred to staff rule 204.3 regarding project personnel, which stipulates that "[t]emporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letters of appointment" and that such appointments "[do] not carry any expectancy of renewal". (*Ibid.*) The Tribunal found that these rules "thus permit the Respondent to separate a staff member appointed under the 200 Series from a post, even without prior notice and without regard to either the quality of the services that the staff member rendered or the staff member's personal attributes". (*Ibid.*) The Tribunal has consistently upheld the application of these rules unless countervailing or exceptional circumstances have been found. As these appointments are entirely dependent on contingencies such as the requests of governments and the availability of funds, the 200 Series system "simply could not function as intended if staff members appointed ... [thereunder] .... had the same guarantees concerning employment and career development as staff members appointed under the 100 Series". (*Ibid.*) The foregoing is clearly incompatible with the Applicant's claim, which is rejected.

IV. Insofar as the Applicant claims he had a legal expectancy of renewal, having received assurances regarding the renewal of his contract from senior ITC management and "chains" of contracts, the Tribunal notes the finding of the JAB that the "assurances" in question did not constitute a promise of continued employment. In this regard, in Judgements No. 205, *El-Naggar* (1975) and No. 422, *Sawhney* (1988), the Tribunal held that a series of renewals of fixed-term contracts did not give rise to an expectancy of renewal. However, the Tribunal held

in *Handelsman* that a legal expectancy could arise from "countervailing circumstances" such as an express promise on the part of the Administration. In this case, according to the Applicant, the Executive Director and Deputy Executive Director of ITC encouraged all Senior Advisers, including the Applicant, to stay and accept even very short-term contracts on the understanding that the management would do their utmost to obtain funding for the posts. Both the management and the Applicant were fully aware of the fact that his contractual situation was very precarious. The Tribunal agrees with the JAB that this encouragement did not amount to an "express promise" sufficient to create a legal expectancy of employment, and recalls Judgement No. 440, *Shankar* (1989) where it affirmed that "a claim to renewal, to be valid, must be based not on mere verbal assertions unsubstantiated by conclusive proof, but on a firm commitment to renewal revealed by the circumstances of the case".

V. The Applicant attempts to rely on *Délano de Stuven* and *Jekhine* to support his contentions. The Tribunal is not persuaded by his arguments. While it is true that in *Délano de Stuven*, the Tribunal maintained that "expectancy for future employment by holders of fixed-term appointments should be decided not entirely by the wording of the Staff Regulations and Rules and of letters of appointment, but by the totality of circumstances existing at the time of staff members' separation from service", the Applicant in that case was not only encouraged to believe that a solution would be found for her continued employment but even received a copy of a letter from the Acting Chief of Personnel, in relation to a loan from the United Nations Federal Credit Union, stating that "her fixed-term appointment ... is expected to be renewable for at least one year".

In *Jekhine*, the Applicant alleged that the non-renewal of his appointment was the result of discrimination. Further, he claimed a legal expectancy of renewal of his appointment because the Respondent wrote a letter to him four days before the expiration of his fixed-term appointment, informing him that he was to be reinstated in the service of the Organization. The Tribunal found that neither the text of the letter, nor any other circumstances, created a legal entitlement to the renewal of his fixed-term appointment, holding "that the Respondent was not bound by any contractual or statutory provision to renew the Applicant's fixed-term contract".

In the instant matter, the Tribunal finds that neither of these Judgements support the Applicant's case and that his second claim must also fail.

VI. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha A. ECHOLS
Member

Omer Yousif BIREEDO
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1001
23 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1001

Case No. 1052: MIRANDA

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Barbara Miranda, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 November 1998, the Applicant filed an Application containing the following pleas:

"II. *PLEAS*

7. With regard to its competence and procedure, the Applicant respectfully requests the Administrative Tribunal *to find*:

...

(b) That the present application is receivable under Article 7 of its Statute.

8. On the merits ... *to find* that:

(a) The Applicant, by entering the service of the United Nations Secretariat on 1 September 1964, acquired the right to receive reimbursement for national income taxes paid on any lump sum payment she would receive from the United Nations Joint Staff Pension Fund;

(b) The Applicant's acquired right to receive reimbursement for national income taxes paid on any lump sum payment she may receive from the United Nations Joint Staff Pension Fund, was not revoked by Part III of the General Assembly resolution 34/165 of 17 December 1979, as stated in the final clause of this resolution;

(c) The Applicant's acquired right to receive reimbursement for national income taxes paid on any lump sum payment she may receive from the United Nations Joint Staff Pension Fund, obligated the United Nations Secretariat to inform all staff members of any changes in granting this right.

9. On the merits ... *to order*:

(a) The rescission of the decision dated 4 august 1998 rejecting the Applicant's request for reimbursement of income taxes on the lump sum withdrawal from the United Nations Joint Staff Pension Fund (...);

(b) Reimbursement to the Applicant in the amount of income taxes actually paid and not yet compensated on the lump sum withdrawal from the United Nations Joint Staff Pension Fund;

(c) The Applicant be reimbursed for interest on the amount from the date the taxes were paid until the date the reimbursement is received;

(d) The appropriate compensation be awarded the Applicant for the injury sustained by her in the amount of two years net base salary."

Whereas the Respondent filed his Answer on 30 August 2000;

Whereas the Applicant filed Written Observations on 24 October 2000;

Whereas the facts in the case are as follows:

The Applicant, a United States national, joined the United Nations on 1 September 1964 as an Editor, at the P-2 level, with the Language and Meetings Services Division, Office of Conference Services, on a probationary appointment. She received a permanent appointment on 1 September 1966 and was promoted to the P-3 level effective 1 July 1968. The Applicant was a participant in the United Nations Joint Staff Pension Fund (UNJSPF) from the inception of her

employment until her resignation from the Organization for personal reasons on 30 April 1970 at which time she withdrew her UNJSPF pension contributions in the amount of $4,605.36.

The General Assembly on 17 December 1979 adopted resolution 34/165, which provided in Part III that:

> "any staff member joining the United Nations Secretariat on or after 1 January 1980 shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received form the United Nations Joint Staff Pension Fund; this decision will not affect staff members serving with the United Nations prior to 1 January 1980."

The Applicant rejoined the Organization on 3 January 1983 with the Editorial and Official Records Division, Department of Conference Services, as an Editor at the T II L level on a temporary short-term appointment. She was granted a probationary appointment on 1 January 1984, and received a permanent appointment on 1 September 1984. She was promoted to the P-4 level effective 1 April 1985 and to the P-5 level on 1 October 1993, and served until her separation from service, effective 31 March 1995.

On 27 July 1990, the Applicant applied to the UNJSPF for a restoration of her prior contributory service from 1 September 1964 to 30 April 1970, in accordance with Article 24 of the UNJSPF Regulations and her pension contribution for the years 1964 to 1970 was fully restored.

On 25 January 1994, the Applicant requested the Secretary, UNJSPF, for an estimate of her monthly pension and her lump sum payment at retirement at the age of 60, as well as other available options, information on post-retirement health benefits, social security entitlement and United States taxes. The Secretary, UNJSPF, replied on 2 February that he was unable to provide the information as yet, since the amount of her contributory service from 1 September 1964 to 30 April 1970 had not been incorporated in the1993 year-end closing of accounts. He would do so as soon as the records were updated.

On 9 May 1994, the Secretary, UNJSPF, advised the Applicant that after her retirement she would be entitled to full annual pension of $27,802, or a reduced annual pension of approximately $18,535 together with a lump sum payment of approximately $118,458. He further advised her that "the Office of Personnel in advance informs those staff members

anticipating retirement during the year of forthcoming seminars relating to pension … taxes, etc."

On 20 February 1995, the Applicant completed the UNJSPF Instructions for Benefit Payments, opting for a one-third lump sum payment. The instructions contained the following warning: "If you elect to commute part or the whole of your benefit into a lump sum, you will renounce all your rights to a minimum retirement benefit under Articles 28 (d) and 28 (e) of the Regulations."

The Applicant retired on 31 March 1995.

On 28 April 1995, the Secretary, UNJSPF, advised the Applicant in a letter that the arrangement had been made to remit to her a lump sum of $118,926, in accordance with her instructions of 20 February 1995, and that he would be glad to answer any questions that she might have with regard to her entitlement.

On 7 February 1996, the Applicant wrote to the Director, Accounts Division, Office of Programme Planning, Budget and Accounts, expressing her surprise at being informed that she would be reimbursed for United States income taxes on her lump sum pension only for the period from 1964 to 1970, but not for the period from 1983 to 1995. She admitted that she had been aware of the General Assembly resolution 34/165, but did not believe that it applied to her, since she was employed by the Organization prior to 1980, and that she would not have opted for a lump sum as part of her pension had she known that she would be ineligible for full tax reimbursement.

On 21 November 1996, the Applicant appealed to the JAB contesting the decision to deny her full reimbursement for the lump sum pension payment received, and distinguishing her case from Tribunal Judgement No. 634 *Horlacher* (1994).

On 22 December 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 1 December 1997. Its considerations and recommendations read as follows:

"***Considerations***

…

19. The Panel first discussed the issue of receivability as raised by the Respondent. It decided to exceptionally waive the time-limits as prescribed in Staff Rule 111.2(a) …

20. Concerning the substance of the appeal, the Panel referred to *Horlacher*…

21. The issue before the Panel … was whether the Appellant was serving on 1 January 1980. The Appellant claimed that, since she had been given a second permanent appointment in 1984, she had thus been reinstated and her acquired right remained valid. The Respondent asserted that she had re-entered the Organization under a new employment contract in 1983 after a break of approximately thirteen years.

22 The Panel carefully studied the Appellant's employment history ... It found that the Appellant had resigned from the Organization in April 1970, and had re-entered the service of the United Nations after a thirteen-year hiatus.

23. The Panel noted that the Appellant had received another permanent appointment in September 1984. It also noted that her pension had been fully restored in 1990. Those two facts no doubt contributed significantly to a misunderstanding on the part of the Appellant that she had in fact been reinstated as a staff member (and not just for purposes of the pension fund), and to her belief that the General Assembly resolution 34/165 therefore did not apply to her, since it did not refer to the issue of reinstatement.

24. The Panel realized that it was incumbent on the Appellant to find out about the tax problems in connection with her retirement benefits. However, it also recognized that there was responsibility on the part of the Organization to alert the Appellant to the special tax problems in store for her if she would opt for a one-third lump sum pension on retirement, instead for merely sending out boilerplate letter. In the Panel's opinion, such more personalized information could have been provided at no or little additional cost to the Organization, but would have been enormously valuable to the Appellant. It might even have prevented the present case from ever becoming an appeal altogether.

…

Recommendations

26. In light of the foregoing, the Panel *unanimously recommends* that the Administration accept its role in creating this situation for the Appellant, and make a restitution of one third of the income taxes (USD 36,486.02 according to her calculation) that the Appellant had paid on that portion of her one-third lump sum pension benefits attributable to her service for the period from1983 through 1995, subject to the production of satisfactory evidence establishing the amount paid of the said income taxes.

27. The Panel makes no recommendation in support of the other monetary reliefs sought by the Appellant."

On 4 August 1998, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"...

The Secretary-General ... has taken note that the Panel decided to exceptionally waive time limits and to consider your appeal receivable.

He has also taken note of the Panel's determination that the pivotal issue before it was whether you were serving as a staff member on 1 January 1980, and its finding that you were not, and that any belief on your part that you should be considered to have been serving on that date was a misunderstanding. The Secretary-General is in agreement with the Panel that you were not and could not be considered to be serving as a staff member on 1 January 1980 and that, therefore, in accordance with General Assembly resolution 34/165 as interpreted by the Administrative Tribunal in the case of *Horlacher*, you were not entitled to reimbursement for income taxes paid on lump sum pension benefits attributable to your service with the Organization after 1980.

Although the Panel concluded that you were not *entitled* to the reimbursement in issue, it nevertheless recommended that you receive reimbursement, under the rationale that the Organization had a responsibility to alert you to the special tax problems facing you upon election to receive a one-third lump sum commutation of your pension benefit and that the Organization did not meet this responsibility. The Secretary-General is not in agreement with this conclusion of the Panel. The Organization has a responsibility to provide information to its staff members but staff members also have an obligation to keep themselves informed and to seek clarification whenever needed. The Secretary-General has found that it was your responsibility to ask the appropriate offices in advance for clarification of the consequences of your preference for a one-third lump sum commutation of your pension benefit on retirement. In a communication to you from the Secretary of the Pension Fund dated 9 May 1994, you were specifically directed to the seminars of the Office of Personnel for a discussion and opportunity to ask questions regarding retirement issues, including tax issues. The Secretary-General has carefully considered your argument that you were not put on notice of the need to ask questions. In this regard, *inter alia*, you stress that the 'reinstatement' of your pension back to 1964 let you to believe that you were reinstated for all purposes, including being considered as a serving staff member on 1 January 1980 for purposes of General Assembly resolution 34/165. The Secretary-General has found that, irrespective of any other factor, the entry on duty date of 1983

on your personnel action forms should have created a doubt in your mind and put you on notice of the need to seek clarification.

The Secretary-General has taken note that the Panel made no recommendation in support of the other monetary reliefs sought by you in your appeal.

Taking into consideration the strict prohibition of General Assembly resolution 34/165 and the considerations discussed above, the Secretary-General has decided not to accept the recommendation of the Panel regarding restitution and to take no further action in your case.

..."

On 23 November 1998, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's acquired right to receive reimbursement for national income taxes paid on any lump sum payment she may receive from the UNJSPF obligates the United Nations to inform its staff members of any changes in granting this right.

2. By entering the service of the United Nations Secretariat on 1 September 1964, the Applicant was entitled to full reimbursement for national income taxes paid on the lump sum payment received.

3. The Applicant's right to receive reimbursement for taxes paid on her lump sum payment was not revoked by Part III of the General Assembly resolution 34/165 of 17 December 1979.

4. The Applicant's case is different from that of *Horlacher* and should be decided differently.

Whereas the Respondent's principal contentions are:

1. The Applicant was not entitled to reimbursement for U.S. income taxes on the lump sum pension benefit she received in respect of her employment with the UN after 1 January 1980.

2. The Administration did not breach any obligation to provide information to the Applicant.

The Tribunal, having deliberated from 26 June to 23 July 2001, now pronounces the following judgement:

I. The Applicant asks the Tribunal to rescind the decision of the Administration that deny her the reimbursement of United States income taxes paid on the lump sum withdrawal from the Pension Fund in connection with her re-employment after 1 January 1980. Her claim is based on a misinterpretation of the second clause of General Assembly resolution 34/165 of 17 December 1979 and an attempt to distinguish her case from Judgement No. 634, *Horlacher* (1994). The Tribunal finds that the Administration properly denied the reimbursement and that *Horlacher* applies.

II. The Applicant's claim turns on the interpretation of the following language from resolution 34/165.

> "... any staff member joining the United Nations Secretariat on or after 1 January 1980 shall not be entitled to receive reimbursement from the Tax Equalization Fund or otherwise for national income taxes paid on lump sum pension payments received from the United Nations Joint Staff Pension Fund; this decision will not affect staff members serving with the United Nations prior to 1 January 1980."

III. The ambiguity of this language was addressed and resolved by the Tribunal in *Horlacher*, which referred to the years of discussions on tax reimbursement described in Judgement No. 237, *Powell* (1979). *Horlacher* also involved a retiree with a period of service before 1 January 1980 and re-employment after that date. Noting the aim of the General Assembly to discontinue income tax reimbursement while protecting those serving when the resolution became effective and continuing in service, the Tribunal decided that the

> "persons to be adversely affected by this discontinuance were all who joined the staff on or after 1 January 1980. But there was obviously concern about providing a degree of protection for persons who were serving staff members on that date. Nothing before the Tribunal suggests that this concern related to individuals who were not then [on 1 January 1980] serving staff members of the Organization, but who at some time in the past, whether briefly or not, had been staff members, or that there was any reason for such a concern." (para. XI)

It should be noted that in two other decisions, Judgement No 373, *Saddler* (1986) and Judgement No. 320, *Mills* (1983), the Tribunal ruled against claims for reimbursement made by applicants who had been in service but were no longer employed on 1 January 1980. Although those cases are somewhat different factually from the matter under consideration, they confirm the position of the Tribunal.

IV. The Applicant was in service from 1 September 1964 until 30 April 1970, during which time she participated in the Pension Fund. She re-entered the service on 3 January 1983 and arranged for the restoration of her pension benefits. This second period of employment was a "re-employment". *See, Horlacher*, para. V. She retired effective 31 March 1995. Thus, on 1 January 1980 she was not employed by the organization.

The Applicant withdrew part of her retirement benefits as a lump sum payment, according to her with the "understanding" that she was entitled to full tax reimbursement. She was aware of General Assembly resolution 34/165, but "did not consider that it did apply to her", since she had entered the Organization before 1980. As occurred in *Horlacher* the Applicant was reimbursed for income taxes paid on that part of the lump sum attributable to her first period of service.

V. The Applicant argues that the administration is legally bound to reimburse her nevertheless, primarily because of what might be described as lack of adequate notice or "lack of precise information" about the split rule on reimbursement, which she says occasioned a heavy financial loss. She asserts that *Horlacher* is distinguishable on the facts, because in that case the employee had received notice of the non-reimbursement rule before he retired, whereas she learned of the rule only after her separation. The JAB found that there was a "responsibility on the part of the Organization to alert the [Applicant] to the special tax problems in store for her if

she would opt for a one-third lump sum pension on retirement, instead of merely sending out boilerplate letters ... [S]uch more personalized information ... might even have prevented the present case from ever becoming an appeal altogether." As a consequence the JAB recommended that the administration make a partial restitution of the taxes that were not reimbursed.

VI. The Tribunal finds that, while the memorandum from the administration might leave something to be desired, it alerted the Applicant to seminars for staff anticipating retirement where matters related to pension, insurance, taxes and other issues would be discussed. She did not attend, although those seminars would have presented the opportunity to learn more and to ask questions about her particular circumstances. Having failed to avail herself of these opportunities, she cannot now claim lack of personalized information or failure to provide other than generalized information. Nevertheless, the Tribunal agrees with the JAB that a matter such as this should not have reached this stage as a dispute.

VII. The Applicant also supports her application with an argument regarding rights she believes she acquired during her first period of employment with the United Nations, which she says, even under resolution 34/165 carried over to her re-employment under a different contract. Similar claims were rejected in *Horlacher*. In that case the Tribunal refused to accept the "extraordinary proposition that the General Assembly, by the second clause of the resolution, wished to confer a potentially large windfall benefit on anyone appointed after 1 January 1980 who, although not in service at the time the resolution took effect, had served, however briefly, at any time in the past." (para. XI) This statement is an implicit rejection of the acquired rights argument in the facts of that case. The position of the Tribunal in *Horlacher* and here accords with case law. As stated for example in Judgement No. 82, *Puvrez* (1961), which is quoted in *Powell*,

> "Respect for acquired rights also means that the benefits and advantages accruing to a staff member for services rendered before the entry into force of an amendment cannot be prejudiced. An amendment cannot have an adverse retroactive effect in relation to a staff member, but nothing prevents an amendment to the Staff Rules, where the effects of such amendment apply only to

benefits and advantages accruing through service after the adoption of such amendment." Judgement No. 82, para. (1961)

VIII. The Administration properly treated differently the first and second periods of service by the Applicant. Regarding the first contract, her acquired rights were respected and she was reimbursed for the relevant income taxes paid. Regarding the second contract, the second clause of resolution 34/165 was properly applied to her new (post 1 January 1980) contract. In sum, as the Tribunal concluded in *Horlacher*, "principles relating to acquired rights are not dispositive in this case." (para. VII). "The Applicant here is being reimbursed for taxes on the portion of [her] lump sum pension payment that is allocable to [her] service with the United Nations prior to 1 January 1980, and that is all that [she] is entitled to. For [her] to receive a greater tax reimbursement would unjustifiably distort the purpose of the General Assembly in adopting resolution 34/165." *Id.*, para. XIV.

IX. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 23 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1002
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1002

Case No. 1094: IBEKWE

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Ngozi Ibekwe, a staff member of the Office of the High Commissioner for Human Rights (hereinafter referred to as CHR), the President of the Tribunal, with the agreement of the Respondent, extended to 31 August 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 31 August 1999, the Applicant filed an Application containing pleas which read as follows:

"II. PLEAS

8. The Applicant ... requests that the [United Nations Administrative Tribunal (UNAT)] take Oral Arguments so that the Applicant ... [has] the opportunity to question ... witnesses ...

Procedural Matters

9. ... [T]he Applicant requests that medical tests be administered to determine the paternity of Ms. [R.] Hijazi's child ...

10. … [The] Applicant requests the Tribunal to order the Administration to answer … interrogatories …

…

12. The Applicant requests that his review be considered solely *in camera*, based both upon written documents and an oral hearing.

…

15. The Applicant respectfully requests that the UNAT order the Secretary-General to provide the following redress as a result of the Applicant's treatment by [the] Respondent, as detailed below:

- The quashing of the [Secretary-General]'s impugned decision to impose a written warning in her file and a one year suspension on step increases in her salary …
- Request for removal of all records of said incident from the Applicant's file;
- Reinstatement of all step increases with retroactive effect;
- The complete dismissal of all the foregoing charges against the Applicant;
- An award of moral damages to the Applicant in respect of the moral and physical strain the foregoing wrongful allegations have visited upon the Applicant;
- The award to the Applicant of the amount of CHF 7,500 for costs and expenses and legal fees incurred in defense of this action;
- The retroactive grant to the Applicant of an SPA [special post allowance] for the past thirteen months in recognition of her performance of the duties of Administrative Assistant, which SPA has been wrongfully denied the Applicant;
- Withdrawal of any and all poor performance evaluations of the Applicant by … which were occasioned by the foregoing prejudice and bias of … against the Applicant;
- That the Applicant's most recent service performance be evaluated by an unbiased independent panel forthwith;
- An award in recognition of the imbalance of power between the Administration and short-term contract employees which would send a message to the Administration to treat said employees with dignity and respect; and
- Such other relief as the UNAT deems necessary, just and equitable."

Whereas the Respondent filed his Answer on 6 February 2001;

Whereas the Applicant filed Written Observations on 30 May 2001;

Whereas the Tribunal ruled on 10 July 2001 that no oral proceedings would be held in the case.

Whereas the facts in the case are as follows:

The Applicant joined the United Nations on 19 May 1980 as a Clerk at the G-2 L level with the United Nations Volunteers Program (UNV), UNDP, Geneva, on a short-term appointment. The Applicant subsequently served on several fixed-term and short-term appointments with two breaks in service, until 1 March 1988, when she joined CHR as a Secretary, at the G-4 level, on a four-month short-term contract, which was extended several times. The Applicant's current appointment with CHR is scheduled to expire on 30 September 2001.

In a letter dated 7 March 1997, a colleague of the Applicant, Ms. Hijazi, complained to the Director-General, UNOG, that on 5 March 1997, the Applicant had made slanderous and defamatory remarks to her while passing her on the way to the Cafeteria. Ms. Hijazi also stated that it had been brought to her attention that the Applicant had made the same remarks about her to other members of the staff on other occasions and requested the Director-General to take appropriate action to rectify the situation.

In a memorandum dated 18 March 1997, the Chief, Personnel Service, United Nations Office at Geneva, (UNOG), advised the Applicant that a complaint had been made against her and requested her to provide comments by 26 March. On 21 March 1997, the Applicant submitted preliminary comments. On 18 April 1997 and on 18 July she was asked to submit further written comments no later than 5 May and 4 August 1997, respectively. The Applicant's comments of 4 August 1997 concluded that "all these allegations coupled with false testimonies attest to a conspiracy aimed at destroying my career development and ultimately preventing the renewal of my contract at its expiry".

On 12 August 1997, the Applicant was notified that the entire dossier would be forwarded to the Office of Human Resources Management (OHRM), for review and advice on the course of action to be taken.

On 23 October 1997, the Director, Specialist Services Division, OHRM, presented the Applicant with allegations of misconduct, stating that the alleged conduct, if established, "would

constitute a violation of the applicable standards of conduct". The Applicant was informed of her right to counsel of her own choosing and requested to submit further comments if she so desired. The Applicant submitted her comments on 18 November 1997.

On 16 February 1998, the Chief, Personnel Service, UNOG, submitted the case to the Joint Disciplinary Committee (JDC), Geneva.

On 3 December 1998, the JDC conducted a formal hearing during which the parties and witnesses were heard. The JDC adopted its report on 5 February 1999. Its conclusion, recommendation and special remark read as follows:

"CONCLUSION AND RECOMMENDATION

78. ..., the Panel **concludes** that:

a. There was evidence indicating that a bitter exchange took place between the staff member and [another staff member], and that it was highly likely that offensive remarks were made by both parties;

b. There was evidence to the effect that, in conversations with two other staff members, the staff member had made the statements she has been charged with; and

c. In view of what it deemed mitigating factors of the case (...), *the staff member's overall behaviour could not be characterized as misconduct.* Furthermore, in the view of the Panel, the staff member should not alone bear the responsibility for the unfortunate incidents under examination.

79. The above notwithstanding, the Panel was of the opinion that the staff member's behaviour was not acceptable, and therefore **recommends** to the Secretary-General that in accordance with staff rule 110.3 (b) (i) the staff member be reprimanded in writing for her behaviour in this instance.

SPECIAL REMARK

80. Based on its experience in this case, the Panel would wish to draw the attention of the Secretary-General to instances where deteriorated interpersonal relations give rise to investigations by the Administration. In this connection, the Panel considers that initial face to-face interviews by the Administration of all the parties involved can prove enlightening in the determination of the course of action to follow. Had such interviews been conducted at the outset of this case, the Administration would have had a clearer picture of the context in which the events in question took place and – the Panel believes – disciplinary proceedings might have been avoided. More importantly,

bearing in mind that the main incident occurred nearly two years ago, quicker remedial action might have been taken, at the level of the Unit concerned, by the Administration.

81. ... the Panel considers that all staff members involved in this case might have benefited from relevant training opportunities and services available within the Organization."

On 11 March 1999, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed her as follows:

"...

The Secretary-General has given careful consideration to the finding and conclusions of the Committee. While in agreement with most of the Committee's conclusions, the Secretary-General does not accept that your behaviour does not amount to misconduct and that you should not alone bear responsibility for the incidents in question. The Secretary-General observes that such a determination is inconsistent with the Committee's finding that you did make slanderous statements about your colleague to two other staff members. He considers that this is an act for which you alone are responsible. The Secretary-General further considers that, by spreading slanderous and harmful rumours about a colleague, your conduct fell short of the standards of conduct expected of an international civil servant, that it violated in particular staff regulation 1.4 and that it amounted to misconduct within the meaning of staff rule 110.1.

The Secretary-General has therefore decided to impose upon you a written censure for your misconduct and unbecoming behaviour for an international civil servant. This letter constitutes the written censure and is also to serve as a warning that any recurrence of such behaviour will not be tolerated. A copy of this letter will be place in your official status file.

..."

On 31 August 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The charge of verbal assault does not exist in law: the Applicant was disciplined not for verbal assault with which she was charged, but rather for other alleged misconduct. This procedural irregularity violates her rights of due process.

2. The alleged behaviour does not rise to the level of misconduct and the disciplinary measure imposed is disproportionate and excessive.

3. The allegations against the Applicant arose from malice, bias and prejudice.

4. The impugned administrative decision of the Secretary-General is based on charges which arise from errors of law, erroneous conclusions, omissions of fact and mistakes of fact and has caused grave moral injury to the Applicant and grave damage to her career prospects.

5. The failure of the JDC and the Administration to order the paternity test requested by the Applicant denied her a reasonable defense.

6. The Applicant's due process rights were violated because she was neither able to obtain counsel of her own choosing, nor allowed to confront those who testified against her.

Whereas the Respondent's principal contentions are:

1 The Applicant's argument that verbal assault is a non-existent offense which cannot be defined as misconduct is without merit.

2. The Applicant was fully informed of the charges against her and given ample opportunity to respond to them.

3. The Applicant's due process rights were fully respected in conformity with all applicable procedural requirements of staff rule 110.4.

4. It is within the Secretary-General's discretionary power to determine what behavior constitutes misconduct, as well as the disciplinary measures to be imposed.

5. The disciplinary measure imposed on the Applicant was not disproportionate or excessive.

6. The decision of the Respondent was not tainted by malice, bias or prejudice.

The Tribunal, having deliberated from 10 to 26 July 2001, now pronounces the following judgement:

I. In her Application, the Applicant requests, *inter alia*, that the Tribunal order rescission of the decision to impose a written censure upon her for misconduct and behaviour unbecoming an international civil servant and removal of all records of the incident at issue from her Official Status file; and that it award her compensation for moral damages.

II. The Tribunal considers that the main issues in the case are the Applicant's contentions that her rights of due process were violated as there was a shift in grounds in the charges against her; that the witnesses against her were motivated by malice, bias and prejudice; and, that the disciplinary measure taken was disproportionate.

III. The Tribunal finds no evidence substantiating the Applicant's contention that the Administration violated her rights of due process under staff rule 110.4. It notes that the Applicant was properly notified of the allegations against her and given a reasonable opportunity to respond thereto, was given the right to seek assistance with her defense, and that the matter was referred to a JDC. The Tribunal is therefore satisfied that the Applicant's rights of due process were respected.

IV. The Tribunal finds no evidence that the witnesses against the Applicant were motivated by malice, bias and prejudice. It notes in this regard that, when making such contentions, the burden of proof is on the Applicant (see Judgements No. 874, *Abbas* (1998) and No. 553, *Abrah* (1992)) and that she has failed to meet her burden.

V. The Tribunal rejects, *ab initio*, the Applicant's plea that a paternity test be imposed. The issue of paternity is entirely irrelevant in this case, which is one of verbal assault.

The Applicant contends that, since the charge of verbal assault does not exist in law and since she was never formally presented with allegations of misconduct, the JDC erred in making a finding of misconduct. The Tribunal disagrees with the Applicant on both counts. First, the Tribunal holds that verbal assault can amount to misconduct subject to disciplinary proceedings under the applicable Staff Regulations and Rules. Moreover, the Tribunal notes that, on 23 October 1997, the Director, Specialist Services Division, OHRM, sent the Applicant a

memorandum, headed "Allegations of Misconduct", charging her with conduct which, "if established, would constitute violation of the applicable standards of conduct". In her reply dated 18 November 1997, the Applicant also used the subject heading "Allegations of Misconduct" when she denied the allegations made against her. In light of this exchange of correspondence, the Tribunal cannot accept the contention of the Applicant that the charge of misconduct was not formally communicated to her.

Accordingly, the Applicant has failed to substantiate that there was a shift in the charges against her, from verbal assault to misconduct.

VI. The imposition of disciplinary measures involves an exercise of discretion on the part of the Administration, which must comply with the standards prescribed by the Tribunal, including the principle of proportionality (see Judgements No. 890, *Augustine* (1998); No. 897, *Jhuti* (1998); No. 898, *Uggla* (1998); and, No. 941 *Kiwanuka* (1999). In the instant case, the Tribunal must examine whether the Applicant's conduct amounted to misconduct warranting disciplinary measures, and whether the disciplinary measure taken was proportionate. The Tribunal disagrees with the Secretary-General's decision that the Applicant's conduct was misconduct meriting disciplinary action. It agrees with the findings of the JDC that because offensive remarks were made by both parties, the Applicant should not bear the sole responsibility for the unfortunate incidents and that there were mitigating factors. In this regard, the Tribunal recalls Judgement No. 773, *Sookia* (1996), a case involving physical assault in which the Applicant was never formally disciplined. The Tribunal therefore concurs with the conclusion of the JDC that, "the staff member's overall behaviour could not be characterized as misconduct".

Nonetheless, the Tribunal does find that the Applicant failed to conduct herself "in a manner befitting [her] status as [an] international civil [servant]" in accordance with staff regulation 1.4 and agrees with the JDC that a written reprimand would have been appropriate.

VII. The foregoing notwithstanding, the Tribunal wishes to take this opportunity to note that cases like this should be disposed of without reaching the disciplinary stage.

VIII. For the reasons stated, the Tribunal:

(i) Orders rescission of the decision of 11 March 1999 to impose upon the Applicant a written censure for her misconduct and unbecoming behaviour an international civil servant;

(ii) Orders that all references to such written censure be removed from the Applicant's file; and,

(iii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1003
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1003

Case No. 1099: SHASHA'A Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha A. Echols; Mr. Omer Yousif Bireedo;

Whereas, on 15 September 1999, Zakia M.F. Shasha'a, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application containing pleas, which read as follows:

"II. *Pleas*

8. The Applicant respectfully requests the Administrative Tribunal:

(a) To find that the administrative decision not to renew the Applicant's fixed-term contract with UNDP beyond its expiry date on 29.2.1996 was irreparably flawed by various abuse[s] of power (détournement de pouvoir).

(b) To order the Secretary-General to grant the Applicant, with retroactive effect a further two-year fixed-term appointment with UNDP and to pay her salaries from the date of her termination, 29.2.1996.

(c) Alternatively, should the Secretary-General decline to [make] such a decision, to compensate the Applicant for the violation of her rights.

(d) In either case, to award ... the Applicant compensation for the slander to which she has been subjected and for the moral and physical suffering to

> which she has been exposed as a result of the glaring abuse of power by UNDP... The compensation should [reflect] the incredible damage inflicted on her entire life, reputation, health and professional career."

Whereas the Applicant filed an additional communication on 30 August 2000;

Whereas the Respondent filed his Answer on 25 September 2000;

Whereas the Applicant filed additional communications on 30 May, 31 May, 5 June, 18 June and 20 June 2001;

Whereas the facts in the case are as follows:

The Applicant joined UNDP on a three-month fixed-term appointment on 1 December 1994, as a Secretary in the Programme Section, UNDP Field Office, Amman, Jordan. The Applicant's appointment was extended twice until 28 February 1996, when she separated from service.

On 7 November 1995, the UN Resident Coordinator and UNDP Resident Representative in Jordan (the Resident Representative) signed a Critical Incident Report in which he registered his dissatisfaction with the Applicant's work and concluded, *inter alia*:

> "... (b) that repeated reminders of a friendly nature have failed to bring about lasting and consistent improvements, and (c) that the necessity to doublecheck and repeatedly correct the correspondance [sic] processed/typed by Ms. Shasha'a is hampering the Programme Section's productivity and slowing down its output".

On 18 December 1995, the Applicant replied, attributing the errors to an "incredible workload", lack of sufficient staffing in the office and unreasonable demands of her supervisor. She also alleged that she was the target of discrimination by her supervisor who was against her assignment to the Office.

On the same day, the Resident Representative wrote to the Applicant, referring to an earlier meeting at which she was notified of his decision not to "extend [her] in [her] present post ... beyond [her] current contract period". He informed her that an internal vacancy announcement had been circulated for her post and that, as she was not suitable for other available positions with UNDP, her contract would not be renewed. He offered to provide her with a letter of reference confirming her period of service, listing a number of her positive

qualities, and explaining that her non-renewal was due to reductions in extra-budgetary funds. Such a letter was written in January 1996.

On 24 January 1996, the Applicant wrote to the Administrator, UNDP, detailing her complaints about her supervisor and requesting an investigation. The Director, Office of Human Resources, UNDP, replied on 18 March 1996, rejecting her "allegations" and confirming the decision to separate her from service upon the expiration of her appointment.

On 1 March 1996, the former Resident Representative, UNDP, wrote a positive letter of recommendation for the Applicant.

On 28 April 1996, the Applicant wrote to the Secretary-General requesting review of the contested decision.

On 5 October 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 17 November 1998. Its considerations and recommendations read as follows:

> "***Considerations***:
>
> 17. As this was a case of non-renewal of a fixed-term appointment, the Panel did not attempt to evaluate the Appellant's performance, but decided to determine whether the administrative decision had been motivated by prejudice, arbitrariness, or some other extraneous factor.
>
> 18. The Panel ... had requested after its first meeting that the Respondent provide some information related to the investigation conducted in UNDP Amman prior to the Appellant's separation from service.
>
> 19. The Panel felt constrained to take account of the unreasonable delay in the Respondent's response to its inquiries. It noted that once the Respondent finally responded, his reply was inadequate and did not properly address the issues raised.
>
> 20. The Panel noted that the memorandum dated 15 June 1998 from [the Resident Representative] answered the first part of the inquiry but failed to address the second part, i.e. whether an investigation was conducted and the result of such investigation.
>
> 21. The Panel also noted that the memorandum from the Respondent merely stated that his office had conducted an investigation and that such investigation proved that the Appellant's allegations against her supervisor were baseless.
>
> 22. The Panel observed that this reply was not satisfactory since it failed to properly answer the questions contained in the original query. It noted that the Respondent did

not provide any contemporaneous evidence (i.e., telephone notes, names of witnesses interviewed, etc.) tending to show that an investigation was indeed conducted.

23. The Panel took note of the Tribunal jurisprudence that the Appellant bears the burden of proving bias, prejudice, improper motivation or other extraneous factors. ...

24. The Panel also took note of the Tribunal's Judgement No. 447, *Abbas* (1989). In that case, the Tribunal held that 'while it has not made any determination as to prejudice or discrimination against the Applicant, the procedure followed in insufficiently investigating his various complaints and the handling of his candidature were inappropriate. On these grounds, the Tribunal considers that the Applicant is entitled to compensation for the injury he suffered.'

25. Having viewed the case as a whole, the Panel noted that sound administrative practice did not appear to have been followed. It noted that the Respondent failed to adduce some evidence tending to show that a proper investigation was indeed conducted, and to provide the findings of such investigation.

Recommendations:

26. In view of the circumstances mentioned above, and in light of the *Abbas* judgement, the Panel makes the following unanimous recommendation:

27. Inasmuch as the Appellant has suffered substantial hardship because of procedural irregularities, the Panel deems it equitable to recommend that she be given compensation in the amount of US$2,500."

On 23 June 1999, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"...

The Secretary-General ... has taken note of the Board's observation that it had not received a satisfactory response to its query on whether your allegations against your supervisor had been investigated, as no contemporaneous evidence had been provided to show that an investigation had indeed been conducted. The Board thus concluded that you had suffered substantial hardship because of procedural irregularities and recommended that you be compensated in the amount of $2,500.

The Secretary-General is not in agreement with the Board's conclusion above. He considers that you did not discharge your burden of proving that the decision not to extend your fixed-term appointment was tainted by prejudice or other improper motive. Recalling the fact-finding role and powers of the Joint Appeals Board (...), the Secretary-General observes that the Board found no evidence that your allegations

bout discrimination and prejudice had any basis in fact. The Secretary-General observes that the Board's dissatisfaction with the information provided by or through UNDP Amman's Country Office cannot be construed as giving more weight to your uncorroborated allegations. In light of the foregoing, the Secretary-General cannot accept the Board's recommendation that you be paid compensation and has decided to take no further action in your case.

..."

On 21 September 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contention is:

The decision not to renew the Applicant's contract was not based on her job performance or the contract expiration itself, but was motivated by prejudice, abuse of power, arbitrariness and improper motives.

Whereas the Respondent's principal contentions are:

1. The Applicant served on a fixed-term appointment which does not carry any expectancy of renewal. Satisfactory or even outstanding performance, by itself, does not create any legal expectancy of renewal. The decision not to renew the Applicant's appointment did not violate her rights.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives or any other extraneous factors.

The Tribunal, having deliberated from 5 to 26 July 2001, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rescind the decision of the Secretary-General not to renew her fixed-term appointment with UNDP. Having begun her employment with the organization in December 1994 and continuing on successive fixed-term appointments, she was separated from service in February 1996 at the expiration of her last appointment.

II. The Tribunal has consistently held that, in general, an employee serving under a fixed term contract has no right to expect the renewal of the agreement, a conclusion dictated by staff rule 104.12(b). The Administration, in its discretion, may decide not to renew or extend the contract without having to justify that decision. Under those circumstances the contract terminates automatically and without prior notice, according to staff rule 109.7. (See Judgements No. 440, *Shankar* (1989); and No. 496, *Mr. B.* (1990).

III. On the other hand, when the Administration gives a justification for this exercise of discretion, the reason must be supported by the facts. (See Judgement No. 885, *Handelsman* (1998).) Under such circumstances, the exercise of discretion is examined not under the rule enunciated in Judgement No. 941, *Kiwanuka* (1999) but for consistency between the reason offered and the evidence. In this case, the conclusions that the performance of the Applicant was unsatisfactory and that no complaints had been investigated are not adequately supported by the record. The justification offered for the exercise of discretion was unconvincing and, perhaps, disingenuous. The absence of a justification for the Administration's action might have been a cause of the delays in responses to questions posed by the JAB. For these reasons, as explained in the judgement, the Tribunal awards the Applicant US$5,000.00 in compensation.

IV. The Applicant's separation from service followed the 7 November 1995 Critical Incident Report. The main assertions of that Report were challenged by the Applicant in meetings, in numerous memoranda and letters, as well as through an appeal to the JAB and her application to this Tribunal.

The Critical Incident Report noted dissatisfaction "with the general quality of work" of the Applicant. It offered as support for that evaluation sample correspondence typed by the Applicant and her failure to correct her perceived shortcomings following meetings with her supervisor. Most of the incidents reported appear to be spelling and typing errors. The Applicant responded that her mistakes were minimal (three mistakes in 81 days based on the letters attached to the Report; more than a dozen in 4 ½ months according to the text of the Report). She alleged that her errors, were caused in part by the heavy workload, lack of sufficient staffing in the office, the unreasonable demands of her supervisor and non-relevant

assignments. She also asserted that her mistakes were no different from those of other members of the secretarial staff and that she was the object of prejudice on the part of her supervisor.

V. The termination was linked to the Critical Incident Report. As stated in a crucial 18 December 1995 letter from the Respondent to the Applicant,

> "I refer to the meeting we had in my office several weeks ago during which we talked about my Critical Incident Report on your performance *and its implications*. On that occasion, I notified you that I had decided not to extend you in your current post within the Programme Section beyond your current contract period.
>
> I trust that the reason for this decision was spelled out clearly to you ... [I]t is my obligation to ensure that our Programme Section is provided with the highest quality of day-to-day secretarial support, and that we are not repeatedly slowed down or held back by the type of problems that I described in your Critical Incident Report." (Emphasis added.)

VI. Unlike in most cases of automatic expiration of a fixed term contract, when no justification is offered, in this case the failure to renew the contract was claimed to be the result of unsatisfactory performance. This reason must be borne out by the evidence. Several occurrences after the issuance of the Critical Incidents Report lead the Tribunal to conclude that the circumstances do not support the justification given. Among them is the 18 December 1995 letter from the Resident Representative to the Applicant. In it the Respondent offered to write a letter of recommendation for the Applicant that would "clarify that [she was] employed against an extra-budgetary post (as opposed to a core post), and that [UNDP was] unable to renew [her] contract due to reductions in [the UNDP] extra-budgetary funds". Later actions by the Respondent appeared to corroborate this statement as a reason for the failure to continue her employment, rather than unsatisfactory performance. Moreover, the 18 December letter referred to two other posts for which the Applicant had been considered.

VII. In a "To Whom It May Concern" letter of reference dated January 1996, the Resident Representative noted lack of funding as the reason for the non-renewal and described the Applicant as a "hard-working staff member who does not shy away from staying on in the office after normal working hours to complete assignments of an urgent nature". She was recommended to anyone needing a "dedicated and hard-working *secretary*". (Emphasis added.)

Later, on 1 March 1996 the previous Resident Representative wrote a "To Whom It May Concern" letter of recommendation, which stated that the Applicant had contributed positively to the work of her section and had performed her duties with a sense of responsibility and complete dedication.

VIII. Sometime between the 7 November 1995 Critical Incident Report and the letter of 18 December 1995, the Respondent attempted to find other duties within UNDP for the Applicant. Although it is unclear whether the two posts mentioned in the December letter required the same skills as those needed for the position the Applicant held, one post - that of a journalist – seemingly would require some of the same skills and more. The third paragraph of that same letter also seems to contradict a finding of incompetence or unsatisfactory performance. It offers a letter of recommendation and additional efforts to find employment. Specifically, the letter states:

> "To make your task of finding new employment somewhat easier, I intend, if you wish, to provide you with a letter of reference which confirms your period of employment with UNDP and lists a number of your positive qualities, e.g., your dedication to the United Nations, your familiarity with the institutions and procedures of the United Nations, your record as a hard-working staff member, etc. … In addition we will actively assist you, if you so wish, in identifying alternative employment in a sister U.N. agency, in a U.N. – funded project, or in a private sector institution here in Amman."

IX. Finally, the Respondent states that, before reaching the conclusions in the Report, it conducted an investigation of the Applicant's complaints. The JAB found the evidence of an investigation "not satisfactory", since in response to its request for information the Administration only (and belatedly) offered the unsupported statement that an investigation had been conducted and that it had proved the baselessness of the Applicant's allegations against her supervisor. The record contains no evidence of such an investigation. In fact there were delays in the JAB proceedings when the Respondent did not reply in a timely fashion to questions posed by the JAB regarding the "investigation". As a consequence, on these procedural grounds the JAB recommended that the Applicant be paid US$2,500 to compensate her for the "substantial hardship because of procedural irregularities". The Administration refused to accept that

recommendation, having concluded that the Applicant had not sustained her burden regarding her allegations of prejudice and improper motive.

X. The Tribunal finds that the Respondent offered an unsupported reason for his failure to offer the Applicant a new contract. He thus improperly exercised his discretion and, incidentally, delayed the JAB proceedings. For these reasons only, the Tribunal awards the Applicant US$5,000 as compensation for the harm she suffered as a result of the conduct of the Administration.

XI. For the foregoing reasons, the Tribunal:

(a) Orders the Respondent to pay the Applicant $5,000 in compensation; and

(b) Rejects all other claims.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Marsha A. ECHOLS
Member

Omer Yousif BIREEDO
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1004
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1004

Case No. 1053: CAPOTE

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas at the request of Maria T. Capote, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 1998 the time limit for the filing of an application with the Tribunal;

Whereas, on 30 November 1998, the Applicant filed an Application containing pleas, which read as follows:

"Section II: *Pleas*

7. ... [T]he Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present Application ...;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To rescind* the decision of the Secretary-General summarily dismissing the Applicant;

(b) *To order* that the Applicant be immediately reinstated with full salary and benefits from the date of her separation from service;

(c) *To find and rule* that the manner in which the Respondent conducted its disciplinary review was procedurally flawed [and] tainted by extraneous considerations, and violated her rights to due process;

(d) *To find and rule* that the suspension without pay of the Applicant for an extended period was arbitrary, based on hearsay and exceeded the discretionary authority of the Respondent;

(e) *To find and rule* that the lengthy delays in and the procedural irregularities of the *ad hoc* Joint Disciplinary Committee proceedings violated the Applicant's right to a timely and fair hearing;

(f) *To find and rule* that the decision by the Executive Director sustaining the Applicant's summary dismissal was procedurally flawed, arbitrary, improperly motivated and based upon mistakes of law and of fact;

(g) *To order* that in addition to reinstatement the Applicant be awarded damages in the amount of three years' net base pay for the violation of her rights and for the resulting damage to herself, her family and her professional reputation."

Whereas the Respondent filed his Answer on 12 February 2001;

Whereas the Applicant filed Written Observations on 28 March 2001;

Whereas on 24 July 2001 the Tribunal decided that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on 19 June 1979, on a three-month fixed-term appointment as Clerk/Typist at the G-2 level, in the Accounts Section, Division of Financial and Administrative Management. At the material time, the Applicant held a permanent appointment as Budget Assistant at the G-6 level in the Division of Financial and Administrative Management, UNICEF.

On 20 December 1996, the Applicant was suspended with pay pending the results of an investigation concerning charges of misconduct placed against her by a Ms. Marianne Kelly, a fellow staff member. On 27 February 1997, the Applicant was summarily dismissed for serious misconduct for allegedly applying for, and opening, two joint credit card accounts in her own name and that of Ms. Kelly, without the latter's authorization, and for making false certifications.

In August 1994, the Applicant and Ms. Kelly entered into an oral agreement whereby the Applicant would pay Ms. Kelly's rent and other miscellaneous bills while she was on Mission in Rwanda. Ms. Kelly gave the Applicant 6 rent cheques and a Power of Attorney on her savings and checking accounts with the United Nations Federal Credit Union.

In December 1994 and August 1995, the Applicant applied for an AT&T Universal credit card and for a Citibank Visa credit card, respectively. Both applications were made jointly in the name of the Applicant and Ms. Kelly, naming Ms. Kelly as primary cardholder, but using the Applicant's address. The Applicant alleged that both applications were made with the full knowledge and consent of Ms. Kelly, as part of a series of financial transactions, which they discussed in a telephone conversation in December 1994 and at a meeting in August 1995 in New York.

Ms. Kelly returned from mission in September 1995. In a sworn statement dated 20 December 1996, she alleged that in August 1994, when she had to go on mission to Rwanda, she had asked a friend (the Applicant) to look after her financial affairs and that she had signed a Power of Attorney at the United Nations Federal Credit Union, authorizing the Applicant access to her accounts. She further alleged that on 12 December 1996, she was contacted by AT&T Universal Card Services and advised that her credit card was three months in arrears in the amount of $2500. She was informed that the account was in both names, but that she was designated "primary card holder". Subsequently, a credit check disclosed that a Citibank Visa account had also been opened in her name and was substantially in arrears. When she contacted the fraud investigators for AT&T and Citibank it appeared that the credit card application forms listed the wrong home address for Ms. Kelly and the wrong maiden name for her mother. In addition, in response to her question whether her signature had been forged, AT&T advised Ms. Kelly that a three-party telephone conversation had taken place in December 1994 between an AT&T representative, the Applicant and a third person who identified herself as Ms. Kelly.

According to Ms. Kelly, on 13 December 1996, she informed the Comptroller, UNICEF, of her discoveries.

On 20 December 1996, the Director, Division of Human Resources, UNICEF, transmitted a copy of Ms. Kelly's statement to the Applicant and informed her that, pending an investigation into these allegations, she was being suspended with pay.

On 27 January 1997, the Director, Division of Human Resources, UNICEF, informed the Applicant that she was being charged with serious misconduct. She was further informed that the allegations with which she had been charged had been confirmed by documentation received from AT&T, which revealed a number of "discrepancies and/or irregularities" on the application for the account, such as an incorrect telephone number and address, and the wrong maiden name for Ms. Kelly's mother. On 12 February 1997, the Applicant submitted her reply to the charges.

On 27 February 1997, Ms. Sham Poo informed the Applicant that the Executive Director had decided to summarily dismiss her on the grounds that her false certifications to AT&T constituted serious misconduct in violation of Article 101 of the United Nations Charter and staff regulation 1.4. In view of the seriousness of the Applicant's misconduct, immediate separation from service was warranted in accordance with staff regulation 10.2.

In a letter addressed to the Secretary-General dated 30 April 1997, the Applicant requested a review of her case by the United Nations Joint Disciplinary Committee (JDC). On 4 June 1997, the Director, Division of Human Resources, UNICEF, advised the Applicant that her case was being referred to an *ad hoc* JDC constituted by UNICEF. On 18 June 1997, the Applicant protested that the use of such an *ad hoc* JDC compromised her rights of due process and a fair hearing. After a series of exchanges of correspondence regarding the Applicant's concerns over its composition, the *ad hoc* JDC was constituted. Its report, dated 7 May 1998, stated in part as follows:

> "1. The Committee is of the opinion that due process and procedural requirements were fully respected, and [the Applicant] was properly informed of the charges against her and of her right to counsel. She was also properly given timely and reasonable opportunity to respond to the charges. Although the Appellant was placed on suspension with pay, she was informed that said suspension did not constitute a disciplinary measure. In addition, the Committee finds that all the evidence presented

by UNICEF has been shared with the Appellant and she has been given the opportunity to respond to any allegations and to seek the assistance of another staff member or retired staff member in formulating her responses to the charges.

2. The Committee is also of the opinion that the Executive Director has taken into consideration all material facts prior to the decision to suspend the Appellant with pay, charge her with misconduct and summarily dismiss her from employment with UNICEF.

3. The Committee is of the view that there was no bias or prejudice related to the decision of the Executive Director to summarily dismiss the Appellant for serious misconduct.

4. The Committee ... is of the opinion that the decision was properly taken in relation to the evidence, and with respect to the exercise of the Executive Director's discretionary authority in disciplinary matters."

On 14 May 1998, the Executive Director, UNICEF, transmitted a copy of the report to the Applicant and informed her as follows:

"...

I have re-examined the decision in light of the Committee's report and have taken note of the Committee's determination that the decision to summarily dismiss you was properly taken, and that there was no bias or prejudice related to that decision. I have therefore decided to maintain your summary dismissal.

..."

On 30 November 1998, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to summarily dismiss the Applicant was tainted by improper considerations, procedural irregularities, and mistakes of facts and law.

2. The Respondent has failed to prove the allegations against the Applicant with a preponderance of the evidence as required by the rules of evidence applicable to disciplinary proceedings.

3. The Applicant's rights of due process and to an impartial and fair hearing were violated by the Respondent's improper use of an *ad hoc* JDC constituted by UNICEF instead of the independent and impartial United Nations JDC.

4. The accusations made against the Applicant are the result of a private complaint made by one individual against another and cannot be deemed to fit the concept of misconduct as defined in the Staff Regulations and Rules.

5. The denial of a hearing to present her views and to question her accuser constituted a serious breach of the Applicant's rights of due process.

6. The *ad hoc* JDC ignored the overwhelming weight of the evidence and violated the provisions of Administrative Instruction CF/AI/1190-05 and Chapter 15.5.22 of the UNICEF Personnel Manual.

Whereas the Respondent's principal contentions are:

1. The Executive Director of UNICEF has broad discretion with regard to disciplinary matters, and this includes the determination of what constitutes misconduct warranting dismissal. The decision of the Executive Director to summarily dismiss the Applicant for serious misconduct was a valid exercise of that discretionary authority.

2. The Executive Director's decision was based on facts adduced during UNICEF's investigation and substantiated in proceedings before the *ad hoc* JDC. The decision was not vitiated by mistake of law or fact, by lack of due process, or by prejudice or other extraneous factors.

3. The facts legally supported the finding that the Applicant had engaged in serious misconduct.

4. The decision of the Executive Director was not improperly motivated, the result of bias, or abuse of discretion.

The Tribunal, having deliberated from 29 June to 26 July 2001, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rescind the decision by which she was summarily dismissed after an allegation was made that she had fraudulently opened credit card accounts in the name of a colleague, Ms. Kelly, and herself and had used the cards for her personal expenditures. No funds of the Organization are at issue. The Applicant claims that her actions were authorized by Ms. Kelly. She argues that certain of the actions taken by the Administration and related to her dismissal were procedurally and substantively flawed. She asks to be reinstated and for damages, among other relief.

The Tribunal considers that the evidence presented relates to a personal dispute that was within the jurisdiction of the credit card companies or the local police authorities. The Administration should not have involved itself to the extent of the suspension and the summary dismissal of the Applicant on the basis of an unsupported allegation by Ms. Kelly, which was followed by procedurally questionable proceedings. The Tribunal orders the Administration to reinstate the Applicant and to pay her six months of her net base salary as compensation for the harm she suffered as a result of the actions by the Administration.

II. Many facts of this case are agreed but the proper interpretation of them is in dispute. They point to circumstances of a personal nature but not to matters of immediate concern to the Administration. When the Administration acted to suspend the Applicant, there was no adequate basis for a finding of a civil or criminal wrong or of other conduct falling within Article 101 of the Charter of the United Nations or staff regulation 1.4.

III. In August 1994, the Applicant, a Budget Assistant, agreed to assist a friend and colleague, Ms. Kelly, during the latter's sudden posting to Rwanda in August 1994. She was given a power of attorney, which is not in the record, but that gave the Applicant access to Ms. Kelly's savings and checking accounts for the purpose of managing her financial affairs. At the least the two agreed that the Applicant would pay Ms. Kelly's rent and other bills. The Applicant was given six checks for the payment of the rent. There is general agreement regarding these facts.

IV. On the other hand, the interpretation of circumstances surrounding the opening of the two credit card accounts, which became substantially in arrears, is in dispute. According to the Applicant, she spoke with Ms. Kelly by telephone in December 1994 and was authorized to open joint credit card accounts, naming Ms. Kelly as the primary cardholder but using the Applicant's address. The Applicant opened an AT&T Universal credit card account in December 1994. She later opened a Citibank Visa account in August 1995, allegedly based on a meeting she held with Ms. Kelly in New York earlier that month. Ms. Kelly denies giving authorization, attending the meeting, and being the third person on the December 1994 telephone call to AT&T, when that account was opened. She says she returned from Rwanda in September 1995 and learned about the credit card accounts in December 1996, only after being contacted concerning the arrearages.

V. On 13 December 1996, Ms.Kelly informed the Comptroller of UNICEF of her discoveries, then made a notarized "Statement" dated 20 December 1996. On the same day the Applicant was suspended with pay pending the results of an investigation into Ms. Kelly's claims. She replied to the charges on 12 February and, based on the preliminary conclusions of the investigation, she was summarily discharged on 27 February 1997 for serious misconduct, *i.e.*, applying for and opening the two credit card accounts without authorization and for making false certifications on the applications for the credit cards. The Director, Division of Human Resources, UNICEF, informed the Applicant of the inconsistencies (false certifications) identified by AT&T, including the fact that she gave her own telephone number instead of her colleague's and the incorrect maiden name of the colleague's mother. The Executive Director of UNICEF classified the false certifications as serious misconduct in violation of Article 101 of the Charter and staff regulation 1.4, warranting immediate separation from service under staff regulation 10.2. An *ad hoc* JDC, in a brief 7 May 1998 memorandum to the Executive Director of UNICEF, found no fault with the decision of the Organization.

VI. An initial legal issue in this case is whether the circumstances described above fall within the disciplinary purview of UNICEF. The Tribunal finds that they do not. The Secretary-General has broad discretion regarding what may be considered to be misconduct. (See Judgement No. 941, *Kiwanuka* (1999).) The broad language of staff rule 110.1 refers in part to a

failure by a staff member to "observe the standards of conduct expected of an international civil servant". This is mirrored by the undertakings made by staff members through their regulations. For example, in staff regulation 1.1 staff members "pledge themselves to ... regulate their conduct with the interests of the United Nations only in view". Staff regulation 1.4 is somewhat more specific, requiring that staff "conduct themselves at all times in a manner befitting their status as international civil servants. ... They shall avoid any action ... which may adversely reflect on their status, or on the integrity, ... required by that status. ..." While a personal matter that reflects adversely on the Organization may be the subject of disciplinary proceedings, the Staff Regulations and Rules principally address conduct related to employment.

VII. This was purely an arrangement of some kind between colleagues regarding personal activities and personal funds. The Administration was not responsible for the financial affairs of Ms. Kelly, had no interest in her funds and could not affect the personal arrangement. It cannot be called on to use suspension with pay to oversee the personal affairs and relationships of its employees under circumstances such as these, i.e., the allegations by Ms. Kelly were disputed and were not in themselves "prima facie well founded". (Judgement No. 931, *Shamsi and Abboud* (1999), para. V). This conclusion is applicable also to the summary dismissal of the Applicant. When the Applicant was suspended, then summarily dismissed, there was an obvious recourse to the credit card companies or to the civil (or criminal) dispute resolution procedure provided by local law.

VIII. Whether or not the agreement was properly implemented did not affect the professional performance of either the Applicant or Ms. Kelly and did not reflect adversely on UNICEF. The actions of the Applicant, even if Ms. Kelly's characterization of them is true, were not incompatible with the proper discharge of her duties and were not actions that adversely reflected on her status or the independence or impartiality of that status and so were not incompatible with the second part of staff regulation 1.4 quoted above.

The more difficult question is whether the conduct of the Applicant ran afoul of the first part of staff regulation 1.4 , in that it did not befit her status as an international civil servant or in that it adversely reflected on her status or integrity to the extent that a suspension with pay

(although not a disciplinary measure) was justified. The Tribunal finds that the answer must be "no" under the circumstances of this case. It notes in particular that the suspension occurred after an unsupported allegation that fell far short of prima facie evidence of wrongdoing. The oral allegation was made on 13 December and the Applicant was suspended on 18 December 1996. It was not until early the next year that the Respondent had any other evidence of the alleged false certification.

IX. To determine whether the summary dismissal was justified, the Tribunal must also consider the mixed substantive and procedural challenges raised by the Applicant. First, it must be recognized that UNICEF properly referred this matter to an *ad hoc* JDC, as provided in the rules, rather than to the United Nations JDC. These decisions were contested by the Applicant but must be upheld. In contrast the delays in the proceedings before the *ad hoc* JDC cannot be justified. The Applicant requested on April 30, 1997 a review of her summary dismissal by a United Nations JDC. After disagreements regarding the appropriate JDC (United Nations or UNICEF, regular or *ad hoc*) and JDC panel (the staff association having refused to appoint a member to an *ad hoc* panel), the Applicant eventually agreed to proceed, while preserving her challenges to the body and its members. She was informed on 11 December 1997 of the composition of the *ad hoc* JDC, which issued its report and recommendations on 7 May 1998.

X. For the foregoing reasons, the Tribunal:

(a) Finds in favour of the Applicant and orders the rescission of the decision of the Respondent dated 27 February 1997 to summarily dismiss the Applicant for serious misconduct;

(b) Orders, in accordance with article 9 of its Statute, that the Applicant be reinstated in a position with the same grade and at the same step that she held when she was separated, with full payment of salary and emoluments from the date of her separation from service, less her earnings from other employment, if any;

(c) Should the Secretary-General, within 30 days of the notification of this judgement, decide in the interest of the Organization that the Applicant should be compensated without further action being taken in her case, the Tribunal fixes the compensation to be paid to

the Applicant at two years of her net base salary, at the rate in effect on the date of her separation from service; and

(d) Orders the Respondent to pay her six months of her net base salary as compensation for the moral injury suffered;

(e) Rejects all other claims.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Brigitte STERN
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1005
26 July 2001

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1005

Case No. 1095: LORGE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas, on 18 and 25 May 1999, Jean-Marie Lorgé, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an application that did not fulfil all the formal requirements stipulated in article 7 of the Rules of the Tribunal,

Whereas, on 19 August 1999, the Applicant, after making the necessary corrections, again filed an Application, containing pleas which read as follows:

"**Pleas**

[...]

2. *Contested decisions whose rescission I have requested*:

2.1 I request that the decisions of UNDP headquarters to prematurely terminate my assignment in Armenia be declared arbitrary, unjustified, seriously damaging to my honour and my professional reputation, and taken in clear violation of

basic administrative rules (United Nations and UNDP) ...

2.2 I request that the decision of UNDP headquarters to prematurely end my career with UNDP be rescinded ...

2.3 I request that my request for early retirement of 30 August 1996 ... and my letter of no contest of 30 August 1996 be considered null and void ...

3. *Obligation whose performance I am requesting*

3.1 I request UNDP headquarters to clearly recognize the implicit promise of a full career (i.e., until normal retirement age in UNDP ...).

3.2 I ask to be immediately reinstated pursuant to chapter IV ... of the United Nations Staff Rules ...

3.3 I request UNDP headquarters to immediately offer me the option of choosing a post among all vacant posts or posts expected to be vacated in the short term that are commensurate with my grade level and experience, as recognized by headquarters ...

4. *Amount of compensation claimed*

4.1 I ask that all the sums which I might be requested to repay owing to the decision to reinstate me (see item ... 3.2 above) be regarded as the minimum compensation payable by UNDP headquarters as reparation for the injury which I have sustained.

4.2 In addition to the minimum amount referred to in item ... 4.1 above, I request that compensation equal to two years' salary be paid to me by UNDP as reparation for the moral suffering which I have endured since 1994 ...

4.3 In the event that no action is taken on my requests ... I ask that compensation equal to five years' salary be paid to me ...

5. *Other requests*

5.1 I request the Tribunal ... to order the imposition of appropriate penalties ... against the staff members who involved UNDP in these nefarious and idle proceedings.

5.2 I ask the Tribunal to order an internal audit of UNDP personnel management since 1994 ...

5.3 I request this internal audit mission to propose such remedies as it deems appropriate in order to put an end to the dysfunctional characteristics disclosed ..."

Whereas the Respondent filed its Answer on 12 October 2000;

Whereas the Applicant filed Written Observations on 22 January 2001;

Whereas the Applicant filed additional documents on 21 and 28 May 2001, on which the Respondent produced comments on 18 June 2001;

Whereas the Tribunal put a question to the Respondent on 5 July 2001, to which the latter replied on the same date;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP in 1971 in Bangui, Central African Republic, on a fixed-term contract. After being assigned to various UNDP offices at the P-2 and P-3 levels, he received a permanent contract on 1 July 1979 and was promoted to P-4 on 1 January 1980. On 1 January 1985, he was promoted to P-5. On 29 December 1990, he was assigned to Moroni, Comoros, as Resident Representative and was promoted to D-1 on 1 January 1992. On 11 August 1995, he was assigned to Yerevan, Armenia, as Resident Representative, where he remained until 30 September 1996.

On 28 March 1996, the Assistant Administrator and Regional Director of the UNDP Regional Bureau for Europe and the Commonwealth of Independent States (RBEC) sent a letter to the Applicant, informing him that "the requests for support letters made by the UNDP Resident Representative in Yerevan [the Applicant] to the Government has created a feeling of discomfort" and that "weaknesses [had been] identified in your performance as Manager of the UNDP Office, as UN Resident Coordinator, and as our man-on-the-spot to develop a UNDP programme". He also noted with concern that no decisive action seemed to have been taken to redress those anomalies and concluded that, in spite of the Applicant's efforts, "the office requires a different UNDP Head of the Office". In his reply dated 10 April 1996, the Applicant refuted these accusations and stated that, under his management, the Office was demonstrating "robust signs of dynamism and efficiency, in contrast to the past". He also stated that "the office profile has entirely changed ... in the right

direction" and that he had "no alternative but to request an audit mission".

On 19 April 1996, the Assistant Administrator and Regional Director, RBEC, wrote to the Applicant, requesting that he leave his duty station early because there was "a difference in perception on what the office profile of UNDP in Armenia should be". On 23 April 1996, the Applicant sent an e-mail to the UNDP Administrator stating that, in view of the situation, a reasonable alternative would be for him to take an early separation package (ESP), as it would be impossible for him to properly carry out his duties as Resident Representative without the support of RBEC.

On 6 May 1996, the Applicant reiterated his request for an audit; he renewed it again on 16 May and on 24 June.

On 28 June 1996, the Applicant requested the Joint Appeals Board (JAB) to suspend the administrative decision to relieve him of his duties as Resident Representative. He also filed a formal statement of appeal against that decision in the event his request for suspension should be denied.

On 10 July 1996, the Applicant made a final request for an audit.

On 17 July 1996, the UNDP Administrator confirmed that the Applicant's assignment would be officially terminated at the end of September 1996. On 31 July 1996 the Director of the UNDP Office of Human Resources confirmed in writing the conditions of the Applicant's agreed separation. The relevant portions of the letter read as follows:

> "You are entitled to a separation indemnity of 21 months (12 months basic plus 6 months additional indemnity plus 3 months in lieu of notice). To bridge you into early retirement in September 1998, the following arrangement will apply:
>
> You will leave ... Armenia effective 30 September 1996 c.o.b. From 1 October through 31 December 1996 you will be on annual leave for three months, to proceed on Special Leave with Full Pay (SLWFP) for the duration of your separation indemnity, i.e. 21 months, from 1 January 1997 through 30 September 1998 c.o.b. when you will officially separate from the Organization ...
>
> ...
>
> Kindly sign the attached letter of no contest ..."

On 19 August 1996, the Applicant again appealed before the JAB the decision taken by UNDP to end his career. He requested the Board to take action on his request of 29 May 1996 or, failing that, on his request of 28 June 1996.

On 30 August 1996, the Applicant signed an early separation agreement in which he accepted the conditions spelled out in the letter dated 31 July from the UNDP Administrator, attaching thereto a letter of no contest, and he submitted a letter of resignation effective 30 September 1998. The following day, on 31 August, the Applicant wrote to the Director of the Office of Human Resources, commenting on his letter of no contest.

On 5 September 1996, the Applicant addressed copies of the early separation agreement and the letter of no contest to the JAB.

On 21 November and 30 December 1996 and on 12 February 1997, the Applicant requested that the audit report on the Yerevan Office be finalized and transmitted to him. On 29 March 1997, the Director of the Office of Human Resources informed the Applicant that the audit report would be issued shortly and that he would receive a copy. On 14 April 1997, the Applicant reiterated his request. On 29 May 1997, he requested the UNDP Administrator to transmit the audit report to him and also to rescind the decision concerning his early retirement. He also requested that his agreement and his signature of the letter of no contest be considered as vitiated by the Administration's abuse of power and undue influence. On 2 June 1997, the Applicant was again informed of the forthcoming issuance of the audit report.

The JAB adopted its report on 9 March 1999. Its considerations, conclusions and recommendations read as follows:

"**Considerations**

21. The Panel first determined that the appeal raised one main issue, namely whether the Appellant's agreement to avail himself of an early separation package was vitiated by the Respondent's undue influence or any other administrative irregularity.

...

23. The Panel ... observed that the Appellant had to adduce convincing evidence tending to prove his allegation that the Respondent coerced his will to take an ESP. The Panel was

of the view that the facts, as presented by both parties, did not disclose any unlawful pressure exercised by the Respondent, in order to induce the Appellant to take an ESP. The Panel noted that on 23 April 1996, the Appellant sent a memorandum to the UNDP Administrator, in which he stated that since it would be impossible for the Appellant to properly carry out his functions as Resident Representative of the Armenia Office, a `reasonable alternative would be for him to take an ESP' ... According to the Panel, this statement constituted an indication that the Appellant himself was considering the ESP as a possible solution to his disagreements with the UNDP Administration. It was of the view that the Respondent was forthcoming in informing the Appellant about the conditions and modalities of the ESP, and that the Appellant unreservedly assented to the terms of the ESP agreement.

Conclusions and Recommendations

24. The Panel could not find any proof or indication suggesting that the Appellant was forced or otherwise unduly induced to sign the ESP agreement. It concluded that the Appellant's rights to due process were duly observed by the Respondent and that there was no violation of his terms of appointment.

25. ... the Panel *unanimously agreed* to make no recommendation in support of the present appeal."

On 8 June 1999, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General ... has taken note that the Panel could not find any proof or indication suggesting that you were forced or otherwise unduly induced to sign the Early Separation Package in question. He has also taken note of the Panel's conclusion that your rights to due process were duly observed by UNDP and that there was no violation of your terms of appointment. He has further noted that the Panel unanimously agreed to make no recommendation in support of your appeal. Accordingly, the Secretary-General has decided to take no further action on your appeal.

..."

On 19 June 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. His signature of an agreement not to contest the modalities of the proposed settlement and his acceptance of an early separation package were vitiated by the Administration's abuse of power and its undue influence.

2. The Administration violated his due process rights and improperly ended his career after having slandered and humiliated him.

Whereas the Respondent's principal contention is:

The Applicant has not adduced any evidence to prove that he was forced or unduly induced to sign the early separation package.

The Tribunal, having deliberated from 27 June to 26 July 2001, now pronounces the following judgement:

I. The Tribunal wishes to explain at the outset that on 28 June 1996 the Applicant filed an initial application with the Secretary of the JAB in New York, making a twofold request: a request for suspension of the Administrator's decision to terminate his employment and, in the event that such request was denied, a formal appeal against that decision. Then, after having accepted the early retirement package on 30 August 1996, he addressed a new request to the Administrator on 29 May 1997, asking the latter to:

A. Rescind his decision of 17 July 1996 requesting the Applicant to take early retirement;

B. Consider the decisions taken by the Applicant on 30 August 1996 as vitiated by the Administration's moral violence and abuse of power;

C. Waive the time-barring of the appeal because of the failure to issue the audit report on the Applicant's management in Armenia.

On 19 August 1997, the Applicant submitted a new appeal to the JAB against the Administrator's decision to end his career with UNDP.

Although it was not within the time limits, the Applicant requested the JAB to take a decision on his request of 29 May 1996 and, failing that, on his request of 28 June 1996.

The Board's report was issued on 9 March 1999. In its report, the Board did not focus on the issue of the inadmissibility of the appeal. It stated unanimously that with regard to the central and substantial issue of abuse of power and lack of due process, the Applicant had not adduced convincing proof, and it therefore rejected the appeal.

II. With regard to the question of the Applicant's acceptance of the early retirement package having been vitiated, the Tribunal confirms the conclusions of the JAB.

The Tribunal notes, first of all, that it has consistently held that United Nations staff members who accept the benefits of agreed terminations, whether they involve early retirement or another type of arrangement, cannot accept them as settlements and at the same time institute proceedings against the United Nations (see Judgements No. 547, *McFadden* (1992), and No. 573, *Bhatia* (1992)). This case-law is obviously contingent upon the departure having been agreed to voluntarily.

The Tribunal is of course aware that the Applicant was extremely divided over what solution to adopt during the summer of 1996, but this fact alone cannot invalidate the conclusion he arrived at, which makes his retirement a freely accepted decision. While the Applicant hesitated over what choice to make, the numerous discussions which he had with the Administration culminated in the early retirement package, with its various related benefits, and in the Administration's agreement to the Applicant remaining in his post until 30 September 1996. A letter of 31 July 1996 set forth in great detail all the benefits for which the Applicant would be eligible following this agreed separation: coverage under the UNDP special programme for early retirements, provided that he accepted before 31 August 1996 (that deadline represented a favour to the Applicant, since the cut-off date for coverage under the programme was normally 30 June 1996); 21 months' paid leave at the Brussels post adjustment level, which was a substantial benefit; and an education grant for his daughter until 1 January 1999.

This agreement was endorsed by the Applicant in two letters of 30 August 1996, the first being the one in which he tendered his resignation effective 30 September 1998, following special

leave with full pay, and the second being the letter of no contest, in which he indicated that he would not contest the terms of the agreement worked out with the UNDP Administration: "This agreement constitutes the final and complete settlement of all or any claims that could have arisen from my employment and its termination prior to this date". In so doing he renounced all earlier claims. The no-contest agreement was obviously given on the condition that the termination indemnities provided for in the letter of 31 July 1996 were actually paid to him; no other reservation was stated.

Nevertheless, on the following day, 31 August 1996, the Applicant put forward a reservation to his letter of no contest, which reads as follows:

> "It is quite clear that the letter of no contest represents an undertaking that cannot be separated from Headquarters conducting itself towards me in a manner consistent with the provisions of the United Nations Staff Rules, starting on 31 July 1996."

That the Applicant sent conflicting signals at different stages of the negotiations over his departure is not in doubt; that he had difficulty adjusting to his early retirement is also clear from a number of documents: for example, in a letter to the UNDP Administrator dated 23 April 1996, he indicates that he wishes to "stress the fact that this prospect of an early retirement weighs all the more heavily on me since I had the firm intention of remaining active within the United Nations system until normal retirement age". Unquestionably, this whole period was a difficult stage in his life; he even mentions that the criticisms addressed to him in May 1996 came a few days after the death of his mother.

The Tribunal wishes to state, however, that there is no evidence on record suggesting that the Applicant did not freely choose his early retirement after having considered all the circumstances and all the facts of the matter. The Tribunal arrives at this conclusion, first, because the Applicant allowed the agreed indemnities to be paid to him without raising the slightest objection and, second, because the Applicant, a jurist by training, signed the two letters of 30 August 1996 knowing full well what was involved. The Tribunal considers that, pursuant to the Staff Rules and to universally accepted principles of law, the consent and signature of an adult person having legal capacity constitutes an undertaking and a future binding obligation, unless there is convincing proof of misrepresentation or fraud on the part of the co-contracting party. Lastly, the Tribunal believes that

the Applicant is wrong in seeking to link the question of the audit to that of his separation from service, for nowhere, either before or during the signing of the agreement of 30 August 1996, did the Applicant make any mention of a condition requiring UNDP to provide him with a report in order for the agreement to be finalized. There is no proof that the Applicant's consent, even if it was not easy for him to give it, was vitiated.

Accordingly, the Tribunal considers that it has not been proven that there was an abuse of power by the Respondent or that the Applicant's rights to due process were violated at the time of his separation from service.

III. The Tribunal now turns to the question of the lack of due process resulting from the failure to transmit the audit report following his departure, considered in and of itself, irrespective of any link with a challenge to the early separation agreement.

Up to 30 September 1998, the Applicant was a UNDP staff member on SLWFP; all of the Administration's obligations towards its staff therefore apply to him.

It is certain that irrespective of the early retirement issue, which the Applicant seeks to link unduly to the issue of the report in order to raise questions about the past, the issue of the failure to transmit that report does arise.

In order to answer the legal questions raised by the application concerning the failure to transmit the report, the Tribunal wishes to state clearly that an employee has no right to obtain an audit of his management. That is a question left to the discretionary judgement of the Administration.

On the other hand, the Tribunal believes that once the Administration agreed to carry out an audit at the request of one of its staff members, there was no justification for refusing to transmit the results of that audit. The Administration's obligations of transparency and due process vis-à-vis its employees imply that such an audit should be transmitted to the principal concerned, especially since in the present case, the Applicant had stated emphatically on numerous occasions that the transmittal of the report held great significance for him.

It is certain that the request for an audit made by the Applicant in his memorandum of 10 April 1996 was presented on several occasions: for example, in a letter of 10 June 1996 to the UNDP Administrator, he mentions expressly that "my request for an audit is of crucial importance to me";

likewise, in a letter of 16 May 1996 and a fax of 24 June 1996, he renewed a request for an audit made on 6 June 1996; lastly, in a letter of 10 July 1996 to the Director of the Office of Human Resources, the Applicant indicates that before tendering his resignation, he is determined to dispel any suspicions that might cloud his reputation, and he reiterates his request for an audit.

The audit mission seems to have been carried out in September 1996. On numerous occasions thereafter, the Applicant asked for the audit report prepared during this mission, to no avail.

Moreover, the Administration nurtured the Applicant's belief that such an audit report existed and that it was to be transmitted to him at any moment. The reply given to the Applicant's various missives, particularly in a letter of 19 March 1997, was that the report had not yet been finalized. The Tribunal notes that the Administration never refused to transmit the report, nor did it inform the Applicant that there was no report; it simply indicated to him each time it was asked that it needed additional time to finalize the report and transmit it to him. This situation persisted for five years. The Administration therefore gave the Applicant the impression that the proper thing for him to do was to wait for the report to be transmitted. The Tribunal notes, for example, that in the aforesaid letter of 19 March 1997, the Director of the Office of Human Resources stated, in reply to one of the Applicant's multiple requests, that the report was about to be finalized: "DAMR [the Division for Audit and Management Review] expects to issue the report in the near future, and a copy will be sent to you promptly".

The Tribunal, however, sought to determine what had happened to this report, and was told by the Director of DAMR, in a letter of 5 July 2001, that no such report existed.

The Tribunal does not consider it necessary to embark on a more thorough investigation into whether or not this report exists. It is compelled to note, however, that the Applicant's good faith was abused. For several years he was led to believe that the report would be transmitted to him.

There are three possibilities: (1) there never was a report; if so, it is incomprehensible that the Administration would deliberately have misled the Applicant by promising to deliver it to him; (2) the report exists; if so, the Tribunal likewise fails to understand why the Administration would have withheld such a report; (3) the report existed and was destroyed; here too, the Tribunal believes that such an act would be contrary to the principles of good governance. Whichever hypothesis is selected, the Tribunal considers that the Administration did not deal with its employee in accordance

with the procedures that can in good faith be expected of the Organization, and that this has resulted in unquestionable injury to the Applicant.

IV. For the foregoing reasons, the Tribunal decides that:

- The Applicant is entitled to $7,000 as compensation for the injury resulting from the failure to transmit the audit report which the Administration continually promised to send him for several years;

- All other claims are rejected.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha A. ECHOLS
Member

Brigitte STERN
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1006
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1006

Case No. 1140: INGGS

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President; Mr. Spyridon Flogaitis;

Whereas at the request of Patricia M. Inggs, a former staff member of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2000 the time-limit for the filing of an application with the Tribunal;

Whereas, on 23 May 2000, the Applicant filed an Application containing pleas which read as follows:

"MAY IT PLEASE the presiding member to agree to an oral proceeding in this case.

MAY IT FURTHER PLEASE THE TRIBUNAL:

[...]

3. To quash the binding decision of the Commissioner-General, as communicated to the Applicant in a letter dated 22 December 1999, and to draw the necessary legal conclusions therefrom, namely, to reinstate the Applicant, or to pay her the termination indemnity and give her the 30 days' written notice to which she is entitled under the applicable statutory and regulatory provisions;

4. To award the Applicant an indemnity consisting of one year's gross salary (including benefits) for the material and moral injury which she has sustained;

5. To award the Applicant, as costs, a sum payable by the Respondent, to be determined at the conclusion of the proceeding."

Whereas the Respondent filed his Answer on 31 October 2000;

Whereas the Applicant filed Written Observations on 28 May 2001, and on 26 June 2001, the Respondent provided his comments thereon;

Whereas on 25 July 2001, the Tribunal decided that no oral proceedings would be held in the case.

Whereas the facts in the case are as follows:

The Applicant joined UNRWA as an International staff member in 1974, but resigned in 1978 when UNRWA Headquarters moved from Beirut to Vienna. Effective 24 February 1985, the Applicant re-entered the service of UNRWA as a Senior Secretary at the G-5 level on a one-year fixed-term appointment in the Field Office in Amman, Jordan. Effective 24 February 1987, the Applicant was granted an indefinite appointment and effective 1 April 1991, she was reassigned to Vienna as a Senior Secretary.

On 24 February 1993, Staff Bulletin No.16/93, entitled "Inter-Organization Movement of International Staff" was issued. This Staff Bulletin provided that should an international staff member leave UNRWA in order to join another United Nations organization or peace-keeping operation, the staff member would only be released on secondment or loan on reimbursable basis "on the clear understanding that by accepting the secondment/loan, the staff member has concurrently resigned from UNRWA's service with effect from close of business on the date of cessation of his/her service with the receiving UN organization".

On 8 June 1994, the Officer-in-Charge, Recruitment and Staff Development, UNRWA, Vienna, was advised by the Office of Human Resources Management (OHRM), that the Applicant had been selected for a one-year assignment to the United Nations Iraq Kuwait Observation Mission (UNIKOM). OHRM requested that UNRWA approve the arrangement and advise as to whether the Applicant would be reabsorbed at the end of the assignment. The fax contains the following handwritten notation: "I informed [the Applicant] that she could not return to UNRWA if she accepted the assignment ..." In its reply of 16 June 1994, UNRWA confirmed that the Applicant had accepted the offer of a one-year assignment with UNIKOM, and agreed to release her "subject to the condition that she resign from UNRWA with effect from the date of completion of her UNIKOM mission".

The Applicant was on mission with UNIKOM on a reimbursable loan arrangement from 12 August 1994 until 30 September 1998.

On 15 August 1996, Staff Bulletin No. 32/96 was released. It stated in part:

> "The Commissioner-General has decided that, with immediate effect, all international staff members of UNRWA who wish to serve with another organization of the United Nations common system for a period of time in order to enhance their skills should be encouraged to do so. To that end, Agency staff will retain the right of return to a post of commensurate responsibility and grade to that which he/she vacated upon departure".

On 3 June 1998, the Chief, Personnel Management and Support Service, Department of Peacekeeping Operations (PMSS/DPKO) asked UNRWA to confirm the re-absorption of the Applicant in the event she completed her assignment. In reply, on 8 June 1998, UNRWA confirmed that, as stated on 16 June 1994, the Applicant would separate from UNRWA "with effect from the date of completion of her UNIKOM Mission assignment".

On 16 September, UNRWA sent a fax to the Chief, PMSS/DPKO, asking whether he intended to extend the Applicant's mission assignment as otherwise she would have to be separated two years prior to her retirement, there being no post available for her at UNRWA. In his reply of 21 September 1998, the Chief, PMSS/DPKO, indicated that the Applicant would not be extended beyond 30 September.

On 27 September 1998, the Applicant was so informed by the Officer-in Charge, Administration and Human Resources, UNRWA, Gaza, and reminded that her release from UNRWA was subject to the requirement that she resign from UNRWA with effect from the date of completion of her UNIKOM mission. On the same day, the Head, International Personnel Section, UNRWA, Gaza, advised the Applicant of her entitlements in connection with her separation from service.

On 28 November 1998, the Chairman, International Staff Association, (C/ISA) wrote to the Director of Administration and Human Resources, UNRWA, Gaza, advising him that he had been consulted by the Applicant about her separation from service and requesting that she be re-absorbed into the Agency in accord with current policies. On 18 February 1999, the Director, Administration and Human Resources replied that it was inappropriate for him to discuss individual cases with the International Staff Association.

By letter dated 15 March 1999, the Applicant requested the Commissioner-General to review the decision not to re-absorb her into the Agency or pay her a termination indemnity. The Commissioner-General replied by letter dated 12 May 1999, that her request could not be entertained since it was received "considerably later than the required time limit".

On 11 June 1999, the Applicant lodged an appeal with the International Staff Joint Appeals Board (JAB). The JAB adopted its report on 2 December 1999. Its findings and conclusions read as follows:

> "**Findings ...**
>
> 17. With regard to receivability the Board considered it appropriate to distinguish between the Appellant's request to rejoin the Agency at the end of her mission assignment with UNIKOM and her request for payment of termination indemnity.
>
> 18. With regard to the Appellant's request to rejoin the Agency at the end of her mission assignment it is obvious that the Appellant chose to deal with the Administration indirectly through the [C/ISA]. The Appellant, as a long serving UN staff member must have been aware of the possibility and requirements to lodge an official appeal. If rejoining the Agency had been of critical importance to the Appellant she should (in parallel with the informal conciliation efforts of C/ISA) have at least lodged a *pro forma* appeal in order to comply with the time limits. From the Appellant's contacts with C/ISA she undoubtedly would have been aware of these options. For reasons, which the Board [is] unable to ascertain, the Appellant chose not

to do so, leaving the Board with the impression that rejoining the Agency was not her first priority. The Board therefore concluded that this part of the appeal was not receivable.

19. With regard to the issue of termination indemnity the Board takes a different view concerning receivability. The Board noted that the issue of termination indemnity was not mentioned in the Administration's letter dated 27 September 1998 to the Appellant setting out her entitlements in connection with her separation from the Agency. This issue was only raised for the very first time in the Appellant's letter to the Commissioner-General dated 15 March 1999 ... The Board got the impression from the available documents that the Appellant was probably not aware that, under the terms of her temporary indefinite contract, that she was entitled to payment of termination indemnity, and may only have become aware of this during the course of her discussions with C/ISA or otherwise. As there has *not* been an explicit refusal by the Administration to pay a termination indemnity and as it seems likely that the Appellant was not aware of the entitlement, the Board concludes that it should interpret the Appellant's raising of the issue in her letter of 15 March 1999 to the Commissioner-General as a claim for an entitlement under staff rule 103.18, dealing with '*Retroactivity of Payments* ... The Board feels that the staff member is essentially making a retroactive claim which she is entitled to do under staff rule 103.18 and that this part of the appeal is therefore receivable.

20. The Board noted that the Appellant, a long serving UN staff member with a temporary indefinite contract, went on mission to UNIKOM at a time when the Agency's policy on Inter-Organization Movement of International Staff as described in Staff Bulletin 16/93 (*i.e. the 'Acar Policy'*) was in effect. The Board also noted that this policy and the related practice has since been changed on several occasions. From its own observations and fact-finding the Board is aware of at least five cases, since the introduction of the "*Acar Policy*', where staff members have been reabsorbed by the Agency; in at least one case a post was even created. The Board is also aware that in some of these cases, including the present case, the concerned staff members were not asked to sign what has become commonly known as the *'Suicide Note'*. From that perspective the Board takes the view that the Appellant's separation cannot be considered as a voluntary resignation from the Agency's services and therefore, *prima facie*, there seems to be an entitlement to payment of termination indemnity under International staff regulation 9.3. The Board also noted that the staff member does not appear to have been given the thirty days written notice as is also required by this staff regulation.

Conclusions:

21. The Board concludes that the part of the appeal, which deals with the Agency's decision not to reabsorb the Appellant into the Agency, is not receivable.

22. The Board concludes that the part of the appeal, which deals with the non-payment of termination indemnity is receivable.

23 Accordingly, the Board invites the Administration to explain the reasons why a termination indemnity was not paid and why the Appellant was apparently not given the required thirty days written notice."

On 22 December 1999, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed her that he agreed with the conclusions of the JAB regarding the receivability of the appeal and dismissed this aspect of the appeal based on this finding. The letter continued:

> "With regard to your claim for payment of termination indemnity the Board ... interpret[ed] the raising of this issue in your letter of 15 March 1999 as a claim for an entitlement under International staff rule 103.18 (Retroactivity of Payments). I do not agree with this finding. [In the letter from the Head, International Personnel Section, UNRWA, Gaza,] of 27 September 1998 ... no termination indemnity was mentioned ... because the Administration considered that you had resigned at the end of completion of your UNIKOM mission ... As stipulated in International staff regulation 9.4 (e) (i) in case of resignation the Administration shall not pay a termination indemnity ... You did not seek review of the decision to treat your termination as resignation within the prescribed time-limits and equally did not seek within the time-limits, a review of any decision which was a necessary consequence of the decision to treat your termination as resignation. Accordingly, I do not agree with the Board's conclusion that the part of the appeal which deals with the non-payment of termination indemnity is receivable. As this aspect of the appeal did equally not comply with the time limits, I have rejected this finding and also dismissed this aspect of the appeal.
>
> ..."

On 23 May 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Tribunal is competent to hear the case since the application is not time-barred due to the intervention of the C/ISA and the delay of the Administration in responding.

2. The Administration has committed errors of law and violated the principles of good faith.

3. The Administration's decision to separate the Applicant from service

caused the Applicant great financial and moral damage.

4. The Applicant's right to re-absorption by UNRWA should have been governed by the policy change introduced by UNRWA on 15 August 1996, granting a right of return for staff members on loan to other United Nations organizations.

Whereas the Respondent's principal contentions are:

1. The application is time-barred and is not receivable in its entirety.

2. The Applicant's claim for salary in lieu of written notice is not receivable by the Tribunal.

3. If the Application or any part thereof is deemed receivable by the Tribunal, the case should be remanded to the JAB for consideration on the merits.

4. The Applicant has failed to demonstrate any non-observance of her contract or of the terms of her appointment with UNRWA.

The Tribunal, having deliberated from 28 June to 26 July 2001, now pronounces the following judgement:

I. The Tribunal considers that the main issues in this case are the requests of the Applicant to be reinstated or granted a termination indemnity.

II. First, the Tribunal examines the request of the Applicant to be reinstated in the Agency. The Tribunal notes that the JAB's conclusion that the Applicant's request was not made within the time limits prescribed by the Staff Rules and, as such, was time-barred, and that it found no exceptional circumstances justifying her non-compliance with the prescribed time limits.

The Tribunal notes that the intervention of the C/ISA with the Director of Administration and Human Recourses, UNRWA, Gaza, on the Applicant's behalf demonstrates the Applicant's early concern about her future employment. The Applicant argues that her appeal was not time-barred by virtue of this ongoing intervention. The JAB was not persuaded by this argument, and the Tribunal agrees. International staff rule 111.3 (a) prescribes the time

limits within which rights must be exercised. The Applicant cannot assert that she was not aware of this rule. The Tribunal has extensive jurisprudence on this issue. (See Judgement No. 868, *Bekele* (1998).) The proper exercise of her rights would not have excluded concomitant friendly intervention of anyone, including the C/ISA, supporting her case before the competent authorities.

The Tribunal agrees with the JAB's finding that the Applicant "should (in parallel with the informal conciliation efforts of [the Chairman of the International Staff Association]) have at least lodged a *pro forma* appeal in order to comply with the time limits". The Tribunal concludes that the request of the Applicant to be reinstated is time-barred and, consequently, not receivable.

III. The Tribunal comes now to the Applicant's request for a termination indemnity.

The Tribunal takes note that a termination indemnity could be granted only if the Applicant's departure from service was not due to resignation. Therefore, the main legal issue to be determined is whether the separation of the Applicant was due to resignation or termination. Further, in the event the Tribunal finds that her separation was due to termination, it must consider whether her request for a termination indemnity is also time-barred.

IV. The Tribunal notes that, on 24 February 1993, prior to the Applicant's departure on mission, Staff Bulletin No. 16/93 was issued by the Director of Personnel, stating that "because of the increasingly difficult financial climate, the very limited number of international posts and the emergency nature and requirements of its programmes and operations" the Agency had decided that staff members who chose to go on mission had "concurrently resigned from UNRWA's service with effect from close of business on the date of cessation of his/her service with the receiving UN organization".

On 12 August 1994, the Applicant began service with UNIKOM on a reimbursable loan arrangement for a period of one year. At the time the arrangement was made, the Administration informed the Applicant of the above-mentioned policy and apparently asked her to sign a letter of resignation in accordance therewith. There is no evidence, however, that the Applicant actually signed such a letter.

In a memorandum of 16 June 1994, the Officer-in-Charge, Department of Administration and Human Resources, UNRWA, Vienna, confirmed that the Applicant's acceptance of the post with UNIKOM meant resignation from UNRWA "with effect from the date of completion of her UNIKOM mission". The reimbursable loan arrangement was periodically extended until 30 September 1998 by way of letters exchanged between DPKO, UNRWA and UNIKOM. Each letter reiterated that UNRWA would not reabsorb the Applicant at the end of her mission assignment. However there is no evidence that these letters were copied to the Applicant.

On 15 August 1996, before the end of the Applicant's mission with UNIKOM, the Agency reversed its policy, as stated in Staff Bulletin No. 32/96. According to the new rule, an official accepting a reimbursable loan arrangement would "retain the right of return to a post of commensurate responsibility and grade to that which he/she vacated upon departure". The Staff Bulletin was instituted with "immediate effect", and "canceled" and "superseded" Staff Bulletin No. 16/93. As the Applicant never received copies of the above-mentioned letters exchanged between DPKO, UNRWA and UNIKOM, and was therefore unaware of UNRWA's insistence on applying the old policy to her, there was no reason for her to believe that she would not come under the provisions of the new policy.

The Tribunal does not consider that the Applicant's separation from service resulted from her resignation: she did not sign a letter of resignation letter; she was unaware that UNRWA insisted on applying the old policy to her despite the fact that it had enacted, "with immediate effect", a new policy, "canceling" and "superseding" the old one; and, according to a letter of 16 September 1998, from the Officer-in-Charge, Administration and Human Resources, UNRWA, Gaza, she was separated "on grounds of redundancy". Notwithstanding the Respondent's argument that the Applicant's resignation took effect on the date on which she left for her mission assignment, the extended period of time on which the Applicant was on the reimbursable loan arrangement is conceivable only if her contract with UNRWA was ongoing. Had her resignation become effective on the date she left on mission, she would have been without a contract for the entirety of her assignment to UNIKOM.

The Tribunal takes note of International staff rule 109.3 which states, *inter alia*, "[a] staff member resigns who gives to the Agency a written notice of resignation ... A resignation

... is always initiated by a staff member". In the case under consideration, the Applicant submitted no such notice of resignation. (See Judgement No. 874, *Abbas* (1998).) Therefore, the Tribunal finds that the Applicant's separation from service was, in fact, a termination.

V. The Tribunal turns now to the question of whether the Applicant's request for a termination indemnity was time-barred. The Applicant's request for a termination indemnity was first made in a letter to the Commissioner-General dated 15 March 1999. The Tribunal finds this understandable as, until then, she was hoping to be reabsorbed in UNRWA. The Tribunal notes that there was no mention of a termination indemnity in the Administration's letter dated 27 September 1998, which set out the Applicant's entitlements in connection with her separation from service.

The Tribunal agrees with the JAB that the Applicant's request for a termination indemnity is not time-barred under International staff rule 111.3 (a). Furthermore, as found by the JAB, the Applicant's claim could be considered as a retroactive claim, which she is entitled to submit under International staff rule 103.18, dealing with retroactivity of payments. The Tribunal notes that, until 15 May 1999, the Applicant was still attempting - and hoping - to be reinstated. There is no evidence that the Applicant was aware that, under the terms of her temporary indefinite contract, she was entitled to a termination indemnity. Moreover, the Administration had never explicitly refused to pay such an indemnity. Accordingly, as the Applicant never voluntarily resigned from the Agency's services, the Tribunal finds that there is an entitlement to the payment of a termination indemnity under International staff regulation 9.4.

VI. For the foregoing reasons, the Tribunal:

(i) Decides that the Applicant's request to be reinstated in UNRWA is time-barred and therefore not receivable;

(ii) Orders that the decision of the Commissioner-General of 12 May 1999 not to pay the Applicant a termination indemnity be rescinded, and that she be paid such termination indemnity at the rate in effect on the date of her separation from service; and,

(iii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Spyridon FLOGAITIS
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary